DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-150
Title: Michigan, Petitioner
v.
Richard Perry Bryant
Docketed: August 5, 2009
Lower Ct: Supreme Court of Michigan
Case Nos.: (133725)
Decision Date: June 10, 2009

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 28 2009	Petition for a writ of certiorari filed. (Response due September 4, 2009)
Sep 3 2009	Brief of respondent Richard Perry Bryant in opposition filed.
Sep 3 2009	Motion for leave to proceed in forma pauperis filed by respondent Richard Perry Bryant.
Sep 16 2009	DISTRIBUTED for Conference of October 9, 2009.
Sep 29 2009	Record Requested .
Oct 8 2009	Record received from Michigan Supreme Court (1 envelope).
Oct 9 2009	Record received from State of Michigan Court of Appeals (1 envelope).
Nov 2 2009	Record received from State of Michigan Third Judicial Circuit Wayne County (1 box).
Nov 4 2009	DISTRIBUTED for Conference of November 24, 2009.
Feb 16 2010	DISTRIBUTED for Conference of February 19, 2010.
Feb 22 2010	DISTRIBUTED for Conference of February 26, 2010.
Mar 1 2010	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Mar 1 2010	Petition GRANTED.
Mar 3 2010	Motion to appoint counsel filed by respondent Richard Perry Bryant.
Mar 24 2010	Motion DISTRIBUTED for Conference of April 16, 2010.
Apr 2 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including April 30, 2010.
Apr 2 2010	The time within which to file respondent's brief on the merits is extended to and including June 16, 2010.
Apr 19 2010	Motion to appoint counsel filed by respondent GRANTED. Peter Jon Van Hoek, Esquire, of Detroit, Michigan is appointed to serve as counsel for the respondent in this case.
Apr 29 2010	Brief of petitioner Michigan filed.
Apr 29 2010	Joint appendix filed.

May 6 2010	Brief amicus curiae of the United States filed.
May 6 2010	Brief amici curiae of Maryland, et al. filed.
Jun 16 2010	Brief of respondent Richard Perry Bryant filed.
Jun 18 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jun 23 2010	Brief amicus curiae of Richard D. Friedman filed.
Jun 23 2010	Motion of Richard D. Friedman for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jun 23 2010	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jul 15 2010	Reply of petitioner Michigan filed.
Jul 20 2010	SET FOR ARGUMENT ON Tuesday, October 5, 2010
Jul 29 2010	CIRCULATED.
Aug 16 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Aug 16 2010	Motion of Richard D. Friedman for leave to participate in oral argument as amicus curiae and for divided argument DENIED. Justice Kagan took no part in the consideration or decision of this motion.
Sep 7 2010	Justice Kagan is recused in this case.
Oct 5 2010	Argued. For petitioner: Lori B. Palmer, Assistant Prosecuting Attorney, Wayne County, Detroit, Mich.; and Leondra R. Kruger, Acting Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For repondent: Peter Jon Van Hoek, Assistant Defender, Detroit, Mich. (Appointed by this Court.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

09-150 JUL 28 2009

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008
No.

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

RICHARD PERRY BRYANT
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

KYM L. WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals

JEFFREY CAMINSKY
Principal Attorney, Appeals

LORI BAUGHMAN PALMER*
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-2698

*** Counsel of Record**

Statement of the Question

I.

Should certiorari be granted to settle the conflict of authority as to whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?

Table of Contents

Page

Statement of The Question ..... -1-

Index of Authorities ..... -3-

Petition ..... -4-

Opinions Below ..... -5-

Statement of Jurisdiction ..... -6-

Constitutional Provisions Involved ..... -5-

Statement of Facts ..... -6-

Reasons for Granting the Writ ..... -7-

Conclusion ..... -14-

Appendix A: Court of Appeals opinion.....-1A

Appendix B; Order denying leave to appeal.....-8A

INDEX OF AUTHORITIES

Cases

Collins v State,
873 NE2d 149 (Ind. App, 2007).....12

Crawford v Washington,
541 US 36, 124 S Ct 1354,
158 L Ed 2d 177 (2004).....7

Davis v Washington,
547 US 813, 126 S Ct 2266,
165 L Ed 2d 224 (2006).....7

People v Bryant,
483 Mich 132 (2009).....8

State v Casique,
2009 WL 1508463 (Call App 1 Dist, 2009)..12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

RICHARD PERRY BRYANT
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

NOW COMES the State of Michigan, by **Kym L. Worthy**, *Prosecuting Attorney for the County of Wayne*, **Timothy A. Baughman**, *Chief of Research, Training, and Appeals*, **Jeffrey Caminsky**, *Principal Attorney, Appeals*, and **Lori J. Palmer**. *Assistant Prosecuting Attorney*, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Supreme Court, entered in this cause on June 10, 2009.

OPINIONS BELOW

The original opinion of the Michigan Court of Appeals is unpublished, and appears as Appendix A. The opinion of the Michigan Supreme Court appears as Appendix B, and is published at 483 Mich 132, __NW2d__ (2009).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right to . . .be confronted with the witnesses against him. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of Material Facts and Proceedings

Officers responding to a radio run that someone had been shot found Anthony Covington lying in a gas station outside his car—grabbing his sides in considerable pain, and blood oozing out of his stomach. When a police officer asked "what happened," Covington responded that he had been shot, that somebody named "Rick" had shot him through a door, and provided a description of his attacker. The officer described the victim as nervous and in obvious pain, constantly grabbing his side, and talking in a halting manner. After waiting with the victim for five or ten minutes until the ambulance arrived, the officers moved from the scene of the shooting to the place identified as the scene of the shooting to attempt to locate and apprehend the shooter. The victim died several hours later. Covington's statements were admitted at Respondent's trial, and he was convicted of second-degree murder.

On June 10, 2009, the Michigan Supreme Court held that the statements taken at the scene where the victim was found were "testimonial," and admitted in violation of the Confrontation Clause, requiring reversal under the "plain-error" standard for forfeited error.

Reasons for Granting the Writ

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) this Court carefully distinguished between "testimonial" and "nontestimonal" statements, concluding that while the Confrontation Clause ordinarily bars use of uncross-examined testimonial statements against a defendant at trial, nothing in the Sixth Amendment precludes admission of "nontestimonial" statements. As the Court observed:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.

Crawford, 124 S.Ct 1t 1373.

Crawford sought to return the Confrontation Clause to its meaning at the time of the adoption. In *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) the Court "fleshed out" the rule of *Crawford*, determining that "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 126 S Ct at 2268-2269.

Here, police officers received a radio run that someone had been shot. On arriving at the scene, the victim was found shot and bleeding on the ground. Preliminary inquiries were made as to "what had

happened," including questions directed at establishing the identity of the shooter and the circumstances of the shooting (for all the police knew, the shooter could have been right on the scene). The victim supplied the identity of the shooter, his description, and the place of the shooting several blocks away, before being taken away by ambulance, and dying several hours later. The police immediately went to the scene described to attempt to apprehend the shooter.

The majority of the Michigan Supreme Court held that on-scene initial questions designed to identify and apprehend an at-large perpetrator of a recent shooting are not questions dealing with an ongoing emergency; the court appeared to overlook the fact that the shooter could be at the scene, something the victim might be able to point out:

> The circumstances, in our judgment, clearly indicate that the "primary purpose" of the questioning was to establish the facts of an event that had already occurred; the "primary purpose" was not to enable police assistance to meet an ongoing emergency. The crime had been completed about 30 minutes earlier and six blocks from where the police questioned the victim. The police asked the victim what had happened in the past, not what was currently happening. That is, *the "primary purpose" of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator* (emphasis supplied).
>
> *People v Bryant*, 483 Mich 132, ___ (2009)

To the majority of the Michigan Supreme Court, then, "identifying, locating, and apprehending" the

perpetrator of a serious shooting that has very recently occurred, one which turned out to be fatal, is not dealing with an "emergency situation." These questions are, in the majority's view, closer to the structured testimonial statements at issue in *Crawford*, *Hammon*, and ensuing cases, rather than to the spontaneous statements found to be non-testimonial in *Davis*.

The counter-intuitive view of the Michigan Supreme Court majority is contrary to that of some other courts. Any human being—let alone someone sworn to "serve and protect" the community—coming upon another human being lying on the pavement with blood pouring from a gunshot wound to the stomach will be painfully aware that the situation is an emergency. Finding out the basics of what happened—ie, "I'm shot; I was shot by Rick through the door at my house a few blocks away"—is part and parcel of any human response to the emergency, so as to protect against further injury to the victim, or injury to the responding officers from a shooter who remains at large; and comforting a dying man while the seconds tick by, straining to listen to what he is saying between his painful gasps, while waiting for the arrival of medical help to try to save him, is hardly the kind of formalized, testimonial interrogation that the Confrontation Clause bars from use at trial. It is, rather, precisely the sort of statement that the Constitution entrusts to the sound discretion of the trial court, to determine questions of admissibility under state law. A more classic depiction of an "excited utterance" would be difficult to find.

In *Crawford v Washington*, the "testimonial" statement at issue was a formal, structured statement the defendant's wife gave to police during a police interrogation, reduced to recorded questions

and answers and recorded on tape. In *Davis v Washington* the Court excluded written statements contained in an affidavit submitted to police in the companion case of *Hammon*, but found that statements made during a 911 call to a police operator from a victim reporting a crime were "nontestimonial," even though the operator was asking questions—questions designed to determine the nature and extent of the emergency, and basic details surrounding the incident. Clearly, the situation in this case is closer to the 911 call than the question-and-answer format of the prototypical "testimonial" statement. Indeed, had the victim made precisely the same statements that he made to the responding officers instead to a 911 operator if he had been in possession of a cell phone, *Davis* would allow the admission of the statements.

The Michigan Supreme Court majority's holding that the police efforts were focused on past events to "establish the fact of a prior offense" appears to ignore the fact that actions by law enforcement typically comes in response to "past events." We do not, in this country, punish people in the future tense; and as a consequence, most police activity revolves around the past, rather than the future. The state court's mistake is in its view that any inquiry about the past transforms an inquiry into a testimonial one: asking "what happened?" does not convert the answer into the functional equivalent of testimony. Rather, the appropriate inquiry is whether the statement at issue sought to describe an event, or to document it—to tell someone what just happened, or to record it. Testimonial statements are those given with a view toward recording the declarant's version of events that have already transpired, for purposes of memorializing it—such as the statement in *Crawford*, occurring two hours after

the event; or the testimonial statement in *Hammon*, which occurred after police had stabilized the situation and were interrogating the witness in a room separated from the defendant about events that had already run their course. This would stand in contrast to spontaneous statements either made during the course of an event, or to discuss or describe a recent event to one who was not there. Thus, a statement to a police officer who has just arrived outlining the situation would not be testimonial; on the other hand, a statement to the same officer seated at a table, with pen and paper in hand to record details of the event, would be.

Here, a correct understanding of the Confrontation Clause yields the following analysis: any 911 calls made to summon help would be admissible, whether made by the victim or someone else. As the situation was still fluid, and the victim was still seriously in need of assistance when police arrived to find him sprawled by his car near the gas pumps, his spontaneous, halting statements to the responding officers—clarifying events, outlining what had happened and who was involved, and indicating where and when the incident had taken place—were non-testimonial and admissible under Michigan evidence law as excited utterances. Within minutes, help arrived, and the officers left the victim in the care of the trained medical professionals while they started to track down the suspect. Had the victim lived, his subsequent statements to doctors may have been admissible as statements relevant to medical treatment, if the prosecution could establish an appropriate foundation. Anything the victim might have said to investigating officers arriving at the hospital to take more detailed, formal statement would have been "testimonial"—but the victim died

before the police could gather any more information from him.

Unlike the Michigan Supreme Court majority, Petitioner does not regard bleeding citizens as no cause for alarm for the police. In this case, police efforts upon finding the victim were directed toward learning what had happened to him, keeping him alive, making him as comfortable as possible until medical help arrived, and identifying the perpetrator and location of the shooting for the protection of the victim, themselves, and the community. Only when medical help arrived did they begin their efforts to find the man who had shot him. And while a "testimonial" statement from the victim might have helped their efforts, the man they found lying and bleeding on the pavement died before he could give them one.

The Michigan Supreme Court opinion is inconsistent with opinions from at least several other jurisdictions. In the unpublished decision of *People v. Casique*, 2009 WL 1508463, 16 (Cal.App. 1 Dist.) (Cal.App. 1 Dist.,2009), for example, a deputy responded to an emergency call of a shooting and discovered the victim still at the scene, near death, bleeding profusely. The court observed as to the statements made by the dying victim that "The context in which the statements were gathered was strikingly distinctive from the formality and solemnity characteristic of testimony at trial." Further, the court noted that California had held that "Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation.' Such an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police 'interrogation' as that term is used in *Crawford*." See also *Collins v. State*,

873 N.E.2d 149, 154 (Ind.App.,2007): "Applying the *Davis* factors, we conclude that, under the circumstances, the questions Grant County Sheriff's dispatcher Kathy Baker asked Downs objectively had the primary purpose of enabling police to meet an ongoing emergency, *i.e., the capture of an alleged murderer who was then at large and very possibly armed and dangerous.*" (emphasis supplied).

Certiorari should be granted to resolve this conflict regarding that which constitutes "emergency circumstances."

Conclusion

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals

JEFFREY CAMINSKY
Principal Attorney, Appeals

LORI J. PALMER
Assistant Prosecuting Attorney
1441 St. Antoine
Detroit, MI 48226
313 224-2698

Appendix A: Court of Appeals Opinion

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Richard Perry BRYANT, Defendant-Appellant.
No. 247039.
Aug. 24, 2004.

Before: CAVANAGH, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second degree murder, MCL 750.317, felony firearm, MCL 750.227b, and felon in possession, MCL 750.224f, arising from the shooting death of Anthony Covington. We affirm.

On April 29, 2001, Covington was shot in the chest and, when he was found by police, he said "I was shot. Rick shot me." He also gave a physical description of Rick and said that he had a conversation with Rick through the back door of a yellow house on the corner of Laura and Pennsylvania, during the course of which he heard a gunshot and as he turned to leave, he was struck by a second bullet that was fired through the door. Although he did not see Rick, he knew Rick was the person who shot him because he recognized his voice. Covington died a few hours later from his injuries.

Police went directly to the house described by Covington and found two bullet holes in the rear door, a bullet, blood on the back porch, and Covington's wallet. They also found a piece of mail addressed to defendant in the trash but neither a gun nor defendant were present. Defendant's girlfriend

and defendant's three children were at the house and his girlfriend indicated that defendant had been there that evening. She testified at trial that she never saw defendant again after that night although they had lived together at that house for about eight months. When the police went to that house about a week later, it appeared to be vacant. Covington's brother, Paul Mitchell, testified that he and his brother lived down the street from defendant, who was only known as "Rick," and that defendant sold drugs from his back door. Covington was one of defendant's customers and had been for about three years. Mitchell also testified that he knew his brother was going to defendant's house the night he was killed to retrieve an expensive coat he had traded to defendant for drugs. Defendant was eventually apprehended in California and extradited to Michigan where he was charged with first-degree murder, possession of a firearm by a felon, and felony firearm with regard to Covington's death.

On appeal, defendant argues that the admission as excited utterances of Covington's statements to police before he died of the gunshot wounds denied him his Sixth Amendment right to confrontation, U.S. Const, Am VI, since he did not have the opportunity to cross examine Covington. Because defendant raises this issue for first time on appeal, our review is for plain error affecting his substantial rights. *People v. Carines,* 460 Mich. 750, 763-764; 597 NW2d 130 (1999).

Defendant relies on the recent case of *Crawford v. Washington,* 541 U.S. ___; 124 S Ct 1354; 158 L.Ed.2d 177 (2004), which held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had the prior opportunity to cross examine the witness. *Id.* at

1374. However, Covington's statements were not "testimonial" in nature since they were not the result of police interrogation. See *id.* at 1364-1365. The police officers who responded to the shooting found Covington laying on the ground, bleeding from the chest and stomach areas. He was moaning, in obvious physical pain, winded, and had a difficult time speaking. They asked him what happened and Covington responded that he had been shot by Rick at Rick's house, through the door, and he gave the location of Rick's house and a physical description of Rick. Covington was taken from the scene by ambulance and died at the hospital. The one question asked by the police-"what happened?"-does not constitute an interrogation and there is no evidence of interrogation. Further, the statements were not any type of "*ex parte* in-court testimony or its functional equivalent." See *Crawford, supra* at 1364. Accordingly, defendant has not established plain error warranting relief.

Next, defendant argues that his motion for directed verdict should have been granted because there was insufficient evidence to establish either that defendant perpetrated the murder or that he did so with premeditation. We disagree. This Court reviews a trial court's decision regarding a motion for a directed verdict de novo and considers the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v. Mayhew*, 236 Mich.App 112, 124; 600 NW2d 370 (1999).

To establish first-degree premeditated murder, the prosecutor must prove that the defendant killed the victim and that the killing was willful, deliberate, and premeditated. MCL 750.316(1)(a); *People v. Bowman*, 254 Mich.App 142, 151; 656 NW2d 835

(2002). First, defendant claims that the prosecutor did not establish that he killed Covington because the only evidence that defendant was the perpetrator was Covington's voice identification of him prior to his death. Defendant claims that it was not sufficient to identify him as the killer.

Voice identification is competent evidence if it is "reasonably positive and certain," and is based on sufficient knowledge by the witness about the voice. *People v. Hayes*, 126 Mich.App 721, 725; 337 NW2d 905 (1983), quoting *People v. Bozzi*, 36 Mich.App 15, 19; 193 NW2d 373 (1971). Such identification evidence is sufficient if it is corroborated by other testimony. *People v. Palmer*, 392 Mich. 370, 377; 220 NW2d 393 (1974). Here, the evidence included that (1) Covington knew defendant, (2) defendant was only known as "Rick," (3) immediately before being shot, Covington had a conversation with defendant through the back door of defendant's house, (4) for about three years Covington had purchased drugs sold by defendant at the back door of the house defendant lived in, (5) Covington was going to defendant's house the night he was shot, (6) there were bullet holes in the back door at defendant's house, as well as blood and Covington's wallet, and (7) the bullet found in Covington had markings on it consistent with being shot through a door. Considered in the light most favorable to the prosecution, we conclude that the evidence was sufficient for a rational trier of fact to find that defendant was the killer.

Second, defendant claims that the prosecutor did not establish that the killing was premeditated. "Premeditation and deliberation may be established by evidence of '(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the

defendant's conduct after the homicide." ' *People v. Abraham,* 234 Mich.App 640, 656; 599 NW2d 736 (1999), quoting *People v. Schollaert,* 194 Mich.App 158, 170; 486 NW2d 312 (1992). Circumstantial evidence and reasonable inferences arising from that evidence may establish elements of a crime. *People v. Nowack,* 462 Mich. 392, 400; 614 NW2d 78 (2000). Here, the evidence included that (1) defendant was selling drugs from the back door of his house, (2) Covington had been a customer for about three years, (3) on the night of the killing, Covington went to defendant's house to retrieve a coat he had traded to defendant for drugs, (4) Covington and defendant had a conversation through defendant's closed back door and then defendant fired two gunshots, at least one chest high, at Covington through the door, (5) there was no evidence that Covington was armed or that the shooting was provoked, (6) defendant immediately fled the scene, with the gun, leaving his children and girlfriend behind, and (7) defendant never returned to the house he had lived in for years but instead fled to California where he resided until he was extradited to Michigan. We conclude that the evidence was sufficient for a reasonable jury to find that defendant killed Covington with premeditation. See *People v. Gonzalez,* 468 Mich. 636, 641; 664 NW2d 159 (2003).

Finally, defendant argues that the trial court committed reversible error when it denied his request, pursuant to MRE 804(b)(1), to admit the prior testimony given by his son in response to an investigative subpoena because he was unavailable to testify at trial. We disagree. We review a trial court's interpretation of a rule of evidence de novo, and its decision regarding the admission of the evidence for an abuse of discretion. *People v. Katt,* 468 Mich. 272, 278; 662 NW2d 12 (2003).

MRE 804(b)(1) is an exception to the rule that hearsay is inadmissible evidence. It provides that "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, ... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination[,]" is admissible if the declarant is unavailable as a witness. A witness is deemed "unavailable" if "absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance ... by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5).

Here, defendant's eleven-year-old son gave a recorded sworn statement during the investigation of this homicide pursuant to a subpoena. Defendant sought to introduce this statement when his son did not appear at trial. However, this statement would only be admissible under MRE 804(b)(1) if the witness was unavailable, i.e., defendant, after diligent good-faith efforts were made, was unable to procure his son's attendance by process or other reasonable means. See *People v. Bean,* 457 Mich. 677, 684; 580 NW2d 390 (1998); *People v. Cummings,* 171 Mich.App 577, 585-586; 430 NW2d 790 (1988).

On the first day of trial, defense counsel requested assistance from the prosecution in locating defendant's son but when the court was going to grant that assistance, defendant personally assured the court that he could make a telephone call and have his son in court the next day. The court then noted that "according to your client he doesn't need the assistance of the prosecutor," to which defense counsel replied "Very well, your Honor." Apparently, on the afternoon of the next day, defense counsel renewed his request for assistance from the

prosecution; a subpoena was issued and its execution attempted that same evening, as well as the next morning, without success. On the third day of trial, defendant then moved for admission of the contested testimony which the court denied on the ground that defendant had not met his due diligence obligation since he merely requested assistance the previous day. In light of defendant's tardy and incomplete efforts to secure the testimony of his son, we will not reverse the trial court's decision. See *Bean, supra; People v. Dye,* 431 Mich. 58, 73-78; 427 NW2d 501 (1988).

Affirmed.

Appendix B: Michigan Supreme Court Opinion

Supreme Court of Michigan.
PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Richard Perry BRYANT, Defendant-Appellant.

Docket No. 133725.
June 10, 2009.

MARKMAN, J.

We granted leave to appeal to consider whether the victim's statements to the police in this case constituted inadmissible testimonial hearsay within the meaning of the United States Supreme Court's decisions in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The Court of Appeals held that the statements were non-testimonial under the test set forth in Davis, 547 U.S. at 822, because they were made "in the course of a police interrogation under circumstances objectively indicating that its primary purpose was to enable police assistance to meet an ongoing emergency." People v. Bryant (On Remand), unpublished opinion per curiam of the Court of Appeals, issued March 6, 2007 (Docket No. 247039), at 3. Because we conclude on the basis of Crawford and Davis that the "primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution," Davis, 547 U.S. at 822, we respectfully disagree and hold that the statements constituted inadmissible testimonial hearsay. Moreover, we conclude that the admission of these statements constituted plain error

requiring reversal. Therefore, we reverse the Court of Appeals and remand for a new trial.

I. FACTS AND HISTORY

The victim lived with his brother within a few houses of defendant, from whom he had been purchasing cocaine for three years. The victim's brother testified that defendant sold drugs to the victim at defendant's back door. On April 28, 2001, the victim told his brother that he planned to redeem an expensive coat that he had pawned with defendant in exchange for some cocaine. On April 29, 2001, between 3:00 and 3:30 a.m., the brother heard gunfire, and at about 3:25 a.m., five police officers responded to a radio dispatch indicating that a man had been shot. They found the victim lying on the ground next to his car at a gas station about six blocks from defendant's house. The victim had a gunshot wound in his abdomen and appeared to be in considerable pain. In response to the officers' questioning, the victim indicated that he had been shot at approximately 3:00 a.m. while standing outside defendant's back door. The victim stated that before being shot he had a short conversation through a closed door with defendant. He identified defendant as the shooter because, although he did not see defendant shoot him, he knew that it was defendant who had shot him because he recognized defendant's voice. While the victim described defendant as being 40 years old, 5' 7? tall, and about 140 pounds, according to defendant's driver's license, defendant was actually 30 years old, 5' 10? tall, and 180 pounds. Although the brother testified that the victim knew defendant's last name, the victim himself told the police that he did not know defendant's last name.FN1 The victim told the police

that, after he was shot, he drove himself to the gas station. The victim died within a few hours after he was transported to the hospital. When the police left the gas station, they immediately proceeded to defendant's house. The police found what appeared to be blood and a bullet on defendant's back porch and what the police believed to be a bullet hole in the back door. The victim's wallet and identification were also discovered outside defendant's house. However, the police did not discover any drugs, guns, bullets, or the victim's coat when they searched defendant's house at approximately 5:30 a.m. on the morning of the shooting. Defendant's girlfriend testified that defendant was not home at the time of the shooting and that she had not heard any gunfire that morning. The medical examiner testified that the bullet that killed the victim had passed through an intermediary target, such as a door. Toxicology tests showed that the victim had consumed cocaine within four hours of his death. Defendant was arrested one year later in California and was extradited to Michigan.

Defendant's first trial resulted in a hung jury. Following a second jury trial, and after two days of deliberations, defendant was convicted of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony.FN2 The Court of Appeals affirmed. People v. Bryant, unpublished opinion per curiam of the Court of Appeals, issued August 24, 2004 (Docket No. 247039).

Defendant appealed, arguing that the trial court erred by admitting the victim's statements to the police identifying him as the shooter.FN3 This Court held defendant's application for leave to appeal in abeyance pending our consideration of People v. Mileski, 472 Mich. 927, 697 N.W.2d 527 (2005), and People v. Walker, 472 Mich. 928, 697 N.W.2d 527

(2005). After we subsequently vacated our orders granting leave to appeal in Mileski and Walker and remanded those cases to the Court of Appeals for reconsideration in light of the United States Supreme Court's decision in Davis, we similarly remanded this case. On remand, the Court of Appeals again affirmed, concluding that the victim's statements constituted admissible non-testimonial hearsay. Bryant (On Remand), supra at 3. When defendant again appealed, we granted leave. People v. Bryant, 482 Mich. 981, 756 N.W.2d 50 (2008).

II. STANDARD OF REVIEW

Whether the admission of the victim's statements to the police violated defendant's Sixth Amendment right of confrontation is a question of constitutional law that this Court reviews de novo. People v. Drohan, 475 Mich. 140, 146, 715 N.W.2d 778 (2006).

III. ANALYSIS

Defendant argues that the admission of the victim's statements to the police identifying defendant as the shooter violated his Sixth Amendment right of confrontation. The Confrontation Clause of the Sixth Amendment of the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him...." U.S. Const, Am VI.FN4 In Crawford, 541 U.S. at 59, the United States Supreme Court held that "[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Although the Court left "for another

day any effort to spell out a comprehensive definition of 'testimonial,' " it did say that "[w]hatever else the term covers, it applies at a minimum to prior testimony ... and to police interrogations." Id. at 68. The Court defined "[t]estimony" as " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " Id. at 51, quoting American Dictionary of the English Language (1828). The Court explained that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id . The Court recognized that "[v]arious formulations of this core class of 'testimonial' statements exist," such as " 'pretrial statements that declarants would reasonably expect to be used prosecutorially' " and " 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " Id. at 51-52 (citations omitted). However, the Court indicated that "[s]tatements taken by police officers in the course of interrogations are ... testimonial under even a narrow standard." Id. at 52. The Court stated that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." Id. at 53. The Court further stated that it was "us[ing] the term 'interrogation' in its colloquial, rather than any technical legal, sense." Id. at 53 n. 4. Finally, Crawford concluded that the statement that the defendant's wife had given in that case in response to police questioning at the police station constituted an inadmissible testimonial hearsay statement. Id. at 53 n. 4, 68.

In Davis, the Supreme Court further expounded on the meaning of the term "testimonial hearsay statements." The Court held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 822. On the other hand, "[t]hey are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id. Davis further explained that "in the final analysis [it is] the declarant's statements, not the interrogation's questions, that the Confrontation Clause requires us to evaluate." Id. at 822 n. 1.FN5

The statements in dispute in Davis were made to a 911 emergency operator. The victim told the operator, "[The defendant's] here jumpin' on me again"; "He's usin' his fists." Id. at 817. The Court held that these statements were non-testimonial. Id. at 829. The Court asserted that Davis was distinguishable from Crawford because in Davis: (1) the victim was "speaking about events as they were actually happening, rather than [as in Crawford] 'describ[ing] past events ... hours after the events ... had occurred"; (2) thus, in contrast to the victim in Crawford, the victim "was facing an ongoing emergency"; (3) "the nature of what was asked and answered ... was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in Crawford) what had happened in the past"; and (4) the victim's "frantic answers were provided over the phone, in an environment that was not tranquil, or even ... safe," while, in Crawford, the victim was

"responding calmly, at the station house, to a series of questions...." Id. at 827 (emphasis in the original; citation omitted). The Court held that the "primary purpose" of the interrogation in Davis "was to enable police assistance to meet an ongoing emergency," and, thus, the elicited statements were non-testimonial. Id. at 828-829.

In Hammon, a companion case decided with Davis, the police responded to a reported domestic disturbance. When the police arrived, the victim was sitting alone on the porch and the defendant was inside. The victim told the police that the defendant had hit her and thrown her. The Court held that because "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime," the victim's statements to the police were testimonial. Id. at 830. The Court explained that Hammon was distinguishable from Davis because in Hammon: (1) "the interrogation was part of an investigation into possibly criminal past conduct"; (2) "[t]here was no emergency in progress"; and (3) "[w]hen the officer questioned [the victim], ... he was not seeking to determine (as in Davis) 'what is happening,' but rather 'what happened.' " Id. at 829-830. As the Court further explained:

> The statements in Davis were taken when [the victim] was alone, not only unprotected by police (as [the victim in Hammon] was protected), but apparently in immediate danger from [the defendant]. [The victim in Davis] was seeking aid, not telling a story about the past. [The Davis victim's] present-tense statements showed immediacy; [the Hammon victim's] narrative of past events was delivered at some remove in time from the danger she described. [Id. at 831-832.]

By contrast, the Court reasoned that Hammon was similar to Crawford because: (1) "[b]oth declarants were actively separated from the defendant"; "[b]oth statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"; and (3) "both took place some time after the events described were over." Id. at 830. Accordingly, the statements in Hammon, like those in Crawford, were testimonial. Id.

In the instant case, there is no question that the victim is unavailable, and defendant did not have a prior opportunity to cross-examine the victim. Therefore, if the victim's statements to the police were testimonial in nature, they are inadmissible. Crawford, 541 U.S. at 68. FN6 Accordingly, the only issue here is whether the victim's statements were made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an "ongoing emergency," as defined by the United States Supreme Court, or whether the primary purpose of this interrogation was to establish or prove past events potentially relevant to a later criminal prosecution. Davis, 547 U.S. at 822.

On remand, the Court of Appeals held that the statements in this case were non-testimonial, and thus affirmed defendant's convictions .FN7 We, however, agree with defendant that the statements were testimonial pursuant to Crawford and Davis The police found the victim lying on the ground outside a gas station. The police asked him what had happened, who had shot him, and where the shooting had occurred. The victim told the police that defendant shot him about 30 minutes earlier at defendant's house, which was about six blocks away,

and that he drove himself to the gas station. These statements related solely to events that had occurred in the past and at a different location. None of these statements referred to events occurring at the time the statements were made, none alleged any ongoing threat, and none asserted the possible presence of the alleged perpetrator. The circumstances, in our judgment, clearly indicate that the "primary purpose" of the questioning was to establish the facts of an event that had already occurred; the "primary purpose" was not to enable police assistance to meet an ongoing emergency. FN8 The crime had been completed about 30 minutes earlier and six blocks from where the police questioned the victim. The police asked the victim what had happened in the past, not what was currently happening. That is, the "primary purpose" of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator.

Davis stated that "in the final analysis [it is] the declarant's statements, not the interrogation's questions, that the Confrontation Clause requires us to evaluate." Id. at 822 n. 1. The declarant here (i.e., the victim) made these statements while he was surrounded by five police officers and knowing that emergency medical service (EMS) was on the way. Obviously, his primary purpose in making these statements to the police was not to enable the police to meet an ongoing emergency of the type identified by the United States Supreme Court, but was instead to tell the police who had committed the crime against him, where the crime had been committed, and where the police could find the criminal. That is, the primary purpose of the victim's statements to the police was to "establish or prove past events potentially relevant to later criminal prosecution." Davis, 547 U.S. at 822.FN9

Further, the officers' actions do not suggest that the officers themselves considered the circumstances at the gas station to constitute an "ongoing emergency," FN10 at least not as the Supreme Court defines that term. None of the officers testified to taking any actions to secure the area, to search the station for the possible presence of any armed individuals, or to provide cover for other officers. None of the officers indicated that he drew his weapon at the gas station, took up a defensive position out of concern that the shooter might be nearby, or called for any backup assistance to ensure the safety of the officer himself or others in the area. And none of the police officers questioned people who were in or around the gas station (other than the victim and the gas station attendant) or searched in any way at the station for the shooter.FN11 Rather, they acted in a manner entirely consonant with officers who knew that the crime had already been committed, that it had been committed at a different location, and that there was no present or imminent criminal threat. Indeed, once the EMS unit arrived for the victim, the police left the gas station and immediately proceeded to defendant's house, where they then called for backup assistance because they feared that defendant might still be inside.FN12

The primary purpose of the police questioning of the victim at the gas station was to determine who shot the victim and where the shooter could be found so that they could arrest him. The police were at the gas station to investigate a past crime, not to prevent an ongoing one, and the victim was not "speaking about events as they were actually happening," as in Davis, but was " 'describ[ing] past events,' " as in Crawford and Hammon. Davis, 547 U.S. at 827 (emphasis in the original; citation omitted) .FN13 The primary purpose of the victim's statements was

not "to describe current circumstances requiring police assistance," as in Davis, but to "establish [ ] the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator," as in Crawford and Hammon. Davis, 547 U.S. at 826-827 (emphasis added).

When the police questioned the victim at the gas station, there simply was no "ongoing emergency," as that term is defined by the United States Supreme Court. The prosecutor argues that the primary purpose of the interrogation was to enable police assistance to meet an "ongoing emergency"-to find and apprehend a criminal before he injured somebody else. This argument is unpersuasive because an "ongoing emergency" in this sense would almost always exist while the police are investigating alleged crimes. That is, to adopt the prosecutor's argument would effectively render non-testimonial all statements made before the offender was placed behind bars.FN14 This is clearly inconsistent with the commands of the Supreme Court. See, for example, State v. Kirby, 280 Conn. 361, 385 n. 19, 908 A.2d 506 (2006) (explaining that "accepting the state's arguments on this point would render meaningless the distinction drawn by the United States Supreme Court, as they would render virtually any telephone report of a past violent crime in which a suspect was still at large, no matter the timing of the call, into the report of a 'public safety emergency' "); State v. Mechling, 219 W.Va. 366, 377, 633 S.E.2d 311 (2006) ("[T]he investigation of a past crime-while necessary to prevent future harms and lead to necessary arrests-is likely to elicit testimonial statements from witnesses that will be subject to the constraints of the Confrontation Clause.") See also Fisher, What happened-and what is happening-to the

confrontation clause, 15 J L & Policy 587, 614 (2007), which explained:

> The presence of an ongoing emergency is important only insofar as it indicates that a declarant's statement describing criminal activity can fairly be described as part of the event itself, rather than a report or a narrative of it. If the law were otherwise, statements reporting criminal activity or accusing others of crimes would always be nontestimonial until a suspect was in custody and unable to cause further harm. Even more to the point, if the law were otherwise, Hammon would have had to come out the other way and the Court could never have indicated that the latter part of the 911 call in Davis was nontestimonial [sic]. Yet the emergencies in those cases were limited to the criminal events themselves, and when those events ceased occurring, statements describing how they had transpired were testimonial.

Equally unpersuasive is the Court of Appeals argument that the police were "responding to an emergency" because "someone at the gas station was shot and laying on the ground." Bryant (On Remand), supra at 3. Once again, this type of "emergency" almost always exists when the police respond to a victim who has been seriously injured. That is, if we were to adopt the Court of Appeals analysis, all statements made while the police are questioning a seriously injured complainant would be rendered non-testimonial, and this is also clearly inconsistent with the commands of the Supreme Court by confusing a medical emergency with the emergency circumstances of an ongoing criminal episode. See, for example, Kirby, 280 Conn. at 384-385, 908 A.2d 506 ("[A]lthough the complainant might have needed emergency medical assistance at the time she made the call, the bulk of her conversation with [the police

dispatcher] nevertheless consisted of her account of a crime that had happened to her in the recent past, rather than one that was happening to her at the time of the call," which "renders the telephone call recording testimonial and, therefore, inadmissible under Crawford"); State v. Lewis, 235 S.W.3d 136, 147 (Tenn., 2007) ("Even though the victim was in a state of distress from his wounds, his comments did not describe an 'ongoing emergency,' as defined in Crawford, and were instead descriptions of recent, but past, criminal activity as in Hammon."). Most importantly, see Davis, 547 U.S. at 828-829, in which the United States Supreme Court indicated that once the defendant stopped attacking the victim and "drove away from the premises," "the emergency appears to have ended." The Court said nothing at all that would remotely suggest that whether the victim was in need of medical attention was in any way relevant to whether there was an "ongoing emergency." Instead, the Court said that once the criminal event was over, i.e., the defendant had stopped assaulting the victim and left the premises, the "ongoing emergency" was over at least for purposes of evaluating an alleged Crawford violation.FN15

The hearsay statements at issue in the instant case are significantly different from the admissible hearsay statements in Davis, i.e., the statements made to the 911 operator while the defendant was still attacking the victim, because, unlike in Davis, this victim was describing past events, rather than describing a criminal episode as it was unfolding, and, unlike in Davis, this victim was away from defendant and the crime scene, and was in the protection of five police officers. On the other hand, this case is significantly similar to Hammon because in both cases the police were seeking through their

questioning to determine what had previously occurred, rather than what was occurring at the time of the questioning, and the victims were separated from the defendants and in the protection of the police. That is, in both Hammon and this case, (1) "[the] declarants were actively separated from the defendant[s]"; (2) "[the] statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"; and (3) "[they] took place some time after the events described were over." Id. at 830.FN16 Here, the officers were obviously attempting to find out "what had happened in the past," as evidenced by the fact that the first question asked was "what happened." The officers were not "seeking to determine (as in Davis) 'what is [now] happening,' but rather 'what happened.' " Davis, 547 U.S. at 829-830. Most importantly, the victim's actual statements pertained to what had happened previously, rather than to what was actually happening at the time of the interrogation. For these reasons, the victim's statements to the police were testimonial and, thus, inadmissible.

Even assuming that the error here is unpreserved because, although defendant objected to the admission of the evidence, he did not do so on the basis of the Confrontation Clause as the trial in this case took place before Crawford,FN17 a reversal is required under the plain error standard. See People v. Carines, 460 Mich. 750, 763-764, 597 N.W.2d 130 (1999). Given that this case was pending when Crawford was decided, Crawford is applicable, Teague v. Lane, 489 U.S. 288, 304, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and, for the reasons discussed earlier, Crawford was clearly violated here. That is, there was error and the error was plain.

In addition, in our judgment, the error clearly prejudiced defendant. The evidence against him was far from overwhelming and the victim's statement indicating that defendant was the one who shot him was obviously extraordinarily damaging. In fact, the prosecutor essentially conceded that the error was prejudicial when, at the suppression hearing before trial, he conceded that the admission of the victim's statements to the police is a "crucial issue to the prosecutor's case; ... if this court rules that the excited utterance is not going to be admissible, then we won't have a trial here...." In addition, during his opening statement to the jury, the prosecutor repeatedly referred to the victim's statements to the police and explained:

> The most important piece of evidence you will hear during this trial is [the victim] in many respects speaking to you. [The victim] will tell you that it was the defendant who shot him. Obviously he won't be here to tell you that. But before he died, the last-one of the last-probably the last thing he was able to say was that Rick shot, Rick shot me.... And ... the police, all of them, heard [the victim] say Rick shot me.... The most important piece of evidence you'll hear during this trial, in other words, will be [the victim] in a certain respect speaking to you from the grave and telling you what happened in this case and telling you who's responsible.... All of the evidence here but mainly [the victim's] own words before he died point to [defendant] having pulled the trigger and having killed [the victim]. [Emphasis added.]

The prosecutor also relied heavily on the victim's statements in his closing statement to the jury, stating:

> The main reason we know enough about what happened to be able to decide beyond a reasonable doubt whether the charges that have been made out here, the main reason we know is because of [the victim's] words himself, his own words to you through those police officers in the early morning of April 29th, 2001. [Emphasis added.]

Further evidence that the error was prejudicial is the fact that defendant's first trial resulted in a hung jury. Finally, the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Carines, 460 Mich. at 763, 597 N.W.2d 130 (citation and quotation marks omitted). For these reasons, we believe that defendant is entitled to a new trial.

We also agree with defendant that the issue whether the victim's statements are admissible under the hearsay exception for dying declarations is not properly before this Court.FN18 At the preliminary examination, the prosecutor argued that the statements were admissible as either excited utterances or as dying declarations. The district court originally ruled that the statements were inadmissible because there had been no showing of the requisite factual foundation. The prosecutor then sought to establish a foundation for admission of the statements directed solely at the question whether the statements were excited utterances. At no point in the ensuing examination was the officer asked any questions concerning whether the victim expressed a belief that his death was imminent or was told that he was likely to die from his wound.FN19 That is, the prosecutor clearly abandoned any effort to establish even a minimally sufficient foundation for the dying

declaration exception, and limited his further questions exclusively to the excited utterance exception. The district court then ruled that the statements were admissible excited utterances, but did not address whether they were also dying declarations. The district court's original ruling that there was not a sufficient foundational basis to conclude that the statements were dying declarations was never appealed or reversed.

Indeed, the prosecutor essentially conceded during the following exchange at the pretrial conference that the victim's statements to the police were not dying declarations:

> The Court: I guess we have two issues ultimately, whether it comes in as a dying declaration or whether it comes in as an excited utterance. Is that where we are?
>
> The Prosecutor: The issue is not whether it comes in as one or the other. It came in at the [preliminary] exam clearly as an excited utterance. I think that's the way it's going to be at trial because I think there's going to be a lack of proof on whether the deceased knew he was dying at the time. [Emphasis added.]

In addition, at the suppression hearing, the prosecutor stated:

> [The victim], as we know, unlike what the officers knew that night, but what we know now is that [the victim] ended up dying of his injuries. He himself, [the

> victim], may not have known that at the time.

During the prosecutor's closing statement to the jury, the prosecutor again said:

> [The victim] ended up dying several hours later. We don't know whether he knew that at the time he said this....

Because a dying declaration must be made while the declarant believes his death to be imminent, and the prosecutor stated that there is a "lack of proof on whether the deceased knew he was dying at the time," the prosecutor seems to have conceded that the victim's statements were not dying declarations. FN20

The circuit court also believed that the prosecutor had abandoned the dying declarations issue when, in response to defendant's request that the prosecutor refrain from referring to the victim's statements as the dying victim's statements during closing arguments, the circuit court stated:

> I think maybe based upon an attorney's knowledge of the difference between dying declaration[s] and excited utterance[s], dying declarations have a [ ] [greater] aura [of] reliability than excited utterances. This was not a dying declaration. It did not come in as a dying declaration, and I'm going to agree with Defense counsel on this one. That should not be characterized as, he lay there dying.... That's pure supposition.

The prosecutor did not contest the circuit court's ruling that the victim's statement was not a dying declaration. In fact, during his closing argument, the prosecutor told the jury that the victim's statements to the police were admissible under the excited utterance exception to the hearsay rule; the prosecutor did not refer to the dying declaration exception. Finally, the prosecutor did not raise this issue in the Court of Appeals or this Court until after this Court granted leave to appeal limited to the issue whether the victim's statements constituted testimonial hearsay under Crawford and Davis. Accordingly, the prosecutor has either effectively conceded that the victim's statements did not constitute a dying declaration or, at the very least, has abandoned this issue. See Gross v. Gen. Motors Corp., 448 Mich. 147, 162 n. 8, 528 N.W.2d 707 (1995) (stating that "[w]hen a cause of action is presented for appellate review, a party is bound to the theory on which the cause was prosecuted or defended in the court below" and "[f]ailure to properly brief an issue on appeal constitutes abandonment of the question").

IV. CONCLUSION

Because the victim's statements to the police were inadmissible testimonial hearsay statements pursuant to Crawford and Davis, and the admission of the statements constituted plain error requiring reversal, we reverse the Court of Appeals and remand this case for a new trial.

MARILYN KELLY, MICHAEL F. CAVANAGH, DIANE M. HATHAWAY, JJ., concur.

WEAVER, J., (dissenting).

I dissent from this Court's decision to reverse the Court of Appeals and remand for a new trial. I would affirm the judgment of the Court of Appeals for the reasons stated in its unpublished opinion on remand, specifically, that the declarant's statements were made in the course of a police interrogation under circumstances objectively indicating that the interrogation's primary purpose was to enable police assistance in an ongoing emergency.

CORRIGAN, J. (dissenting).

I respectfully dissent. The Court of Appeals reasonably concluded that the victim's statements made within a half-hour of being shot while he lay bleeding in a parking lot were non-testimonial for Confrontation Clause purposes because they were elicited by police officers addressing an ongoing emergency. Further, I question the majority's treatment of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), as conclusive regarding the admissibility of the victim's statements under these facts, where, although the victim's statements were likely also dying declarations, the prosecution abandoned this argument in the lower courts. The statements likely would have qualified for admission both as excited utterances and as dying declarations but, under then-existing law, the prosecution needed only to advocate for admission under one theory. It chose the former. After the trial, however, the United States Supreme Court established new Confrontation Clause standards in Crawford and further suggested

that dying declarations might prove a rare exception to the new rule. The statements in this case seem admissible as dying declarations, thus potentially obviating much of the majority's analysis. Accordingly, the majority's opinion-which reverses a number of close calls made by the Court of Appeals in this highly fact-specific case-exemplifies the adage that "bad facts make bad law." For these reasons, I would affirm defendant's convictions.

As recounted in the majority opinion, police officers arrived at a Detroit gas station at 3:25 a.m. within minutes after receiving a report of a shooting. It appears that they did not know how long ago the shooting had occurred, where it took place, or whether the shooter was at the gas station. They found the gunshot victim lying on the ground, bleeding, visibly in pain, and having trouble talking. They asked him what happened. He reported that defendant shot him about 3:00 a.m. at a residence six blocks away. The majority concludes that the primary purpose of the officers' questions "was to establish the facts of an event that had already occurred," not to "enable police assistance to meet an ongoing emergency." Ante at 11. But the majority considers the facts in hindsight, rather than with an objective view of the circumstances at the time the statements were made. The United States Supreme Court's opinion in Davis clearly establishes that the statements must be viewed through an objective assessment of the circumstances surrounding them: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Id. at 822 (emphasis added); and see Crawford, supra at 52 (emphasis added; citations omitted) (statements have been characterized as

testimonial if they " 'were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial' ").

First, the majority assumes too much when it concludes that there was no ongoing emergency because the shooting necessarily occurred 30 minutes earlier. Rather, it is more likely that experienced officers would not take the victim's time estimate so literally as to summarily conclude that they, the victim, and the public were out of danger. The officers themselves reported that the victim was visibly in pain and having trouble talking; I cannot imagine that they trusted him to have looked at his watch the moment after he was shot. Further, even at trial a precise time was never established; indeed, the victim's brother testified that he heard shots between 3:00 and 3:30 a.m.

In any event, even if we assume that the reported shooting occurred a full 25 minutes earlier at 3:00 a.m., this time lapse certainly does not prohibit as a matter of law the conclusion of the Court of Appeals that an emergency was ongoing. Rather, the officers knew that an armed assailant had been within six blocks of their location. They could not be sure that the assailant would not harm others or pursue the victim.FN1 One could reasonably conclude that the assailant posed an immediate, continuing danger. Therefore, even if we assume that about 30 minutes had passed, this case does not become automatically comparable to cases such as Crawford, where police questioned the declarant at the police station "hours after" the relevant events occurred. See Davis, supra at 827.

Contrary to the majority's assertions, ante at 18 n. 15, Davis does not establish an artificial threshold after which all questions are assumed to be for purposes of retrospective investigation and all statements in response are presumed testimonial. The semantic difference between what is "actually happening" and what has already "happened" is not so simple when applied to the real world, where context controls which legal labels most aptly apply. The amount of time that has elapsed between the onset of an emergency and statements about that emergency clearly must be considered in context.FN2

For similar reasons, I disagree with the majority's presumption that the victim's statements were not made during an ongoing emergency as a matter of law because the victim had escaped to the gas station. A mere distance in space between an initial event and the ensuing statements by a victim is not dispositive. Neither Davis nor Crawford states a bright-line rule establishing that an emergency ends the moment the assailant and victim are physically separated to any extent. Instead, clearly the nature of the initial assault, including the type of weapon used, affects whether an objective victim or police officer would conclude that the threat has ended, as I discuss further infra when I address the facts of Hammon, the companion case of Davis.FN3 Indeed, as the majority acknowledges, ante at 14 n. 12, there may have been an ongoing emergency originating from defendant's house. There is no principled reason to conclude as a matter of law that the officers' questions and the victim's statements were unrelated to, or did not constitute a part of, that emergency merely on the basis of a distance of six blocks. FN4

For these reasons, I cannot join the majority's conclusion that the victim's statements "related solely to events that had occurred in the past...." Ante at 10. Rather, as in Davis, supra at 827, "the nature of what was asked and answered ... was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn ... what had happened in the past." Accordingly, I also disagree with the majority's comparison of this case to Hammon. There, the police spoke to the domestic violence victim while she sat on her front porch. She stated that the defendant had "hit" and "thrown" her. The defendant was inside the house. Davis, supra at 830. The Court reasonably determined that the victim was no longer in danger because she was protected by the police. Id. at 831. Further, because she suffered physical abuse but did not report that her assailant used a gun or that others were in danger inside the home, the prospect of continuing immediate danger to the victim, the officers, or the public was negligible. In contrast, the evidence here much more strongly suggests that an emergency was in progress and that the officers sought to determine " 'what is happening,' " not simply " 'what happened.' " Id. at 830. Indeed, a gunman was on the loose. The officers did not know his location or whether he remained a threat. Thus, I cannot agree that the officers primarily questioned the victim "to investigate a past crime," ante at 14, or to "establish or prove past events potentially relevant to later criminal prosecution," Davis, supra at 822, as in Crawford and Hammon. Ante at 2, 15.

This case seems to fall midway on a spectrum between the facts of Crawford and those of Davis. As the Davis Court explained, in Davis the 911 caller "was speaking about events as they were actually happening, rather than 'describ[ing] past events.' "

Davis, supra at 827 (emphasis and punctuation in original), quoting Lilly v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (plurality opinion). The call was "plainly a call for help against [a] bona fide physical threat," and the nature of what was asked and answered in Davis, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in Crawford) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. [Davis, supra at 827.]

In Crawford, in contrast, the declarant's statements were made during questioning at the police station that took place "hours after the events she described had occurred." Davis, supra at 827. The Davis Court also described the "striking" difference in the "level of formality between the two interviews." Id. The declarant in Crawford was "responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers." Id . The declarant in Davis, on the other hand, provided "frantic answers ... over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." Id.

I agree with the majority that this case is not precisely comparable to Davis because, here, the victim was not facing an immediate physical threat from an assailant, and the police had arrived on the scene. But this case is also by no means directly comparable to Crawford because, here, the shooting had just occurred, the statements were made only blocks away from the crime, the victim was in pain from untreated wounds that would soon prove to be

fatal and was having trouble talking, and it was uncertain whether he, the police, or the public were out of physical danger. For these reasons, I conclude that this case is more similar to Davis than to Crawford. And, most significantly, to the extent this case's location on the spectrum presents a close question, the Court of Appeals did not clearly err when it concluded that the emergency was ongoing and the victim's statements were non-testimonial.

Finally, the majority's decision is clouded by the prosecution's abandonment of its original argument that the victim's statements were dying declarations. The majority reasonably concludes that the prosecution abandoned this argument, which it raised only at the preliminary examination, by continuing to advance only its alternative theory that the victim's statements were excited utterances.FN5 This was a reasonable strategy at the time this trial took place. As the majority observes, before the United States Supreme Court issued Crawford, hearsay statements admissible under a "firmly rooted hearsay exception"-including "excited utterances" or "spontaneous declarations"-did not violate the Confrontation Clause. Ante at 19 n.. 17, citing Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), and White v. Illinois, 502 U.S. 346, 355-356 n. 8, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). Crawford and Giles v. California, --- U.S. ----, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008), have "subsequently suggested that dying declarations- but not some or all excited utterances-may remain admissible under Crawford, although unconfronted, because the dying declaration is an historical exception to hearsay rules that predated the Confrontation Clause. Giles, supra at ----, 128 S Ct at 2682; Crawford, supra at 56 n. 6, 58 n. 8; and see the majority's discussion ante at 9 n. .6, 22 n. 18. The

victim's statements here seem to qualify as dying declarations. He had been shot in the stomach at most 25 minutes before he spoke to the officers. He was lying on the ground, bleeding, in pain, and having trouble speaking. He had not yet received medical attention. He died a few hours later. Accordingly, his statements likely would have qualified as "statement[s] made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." MRE 804(b). Although the prosecution chose not to establish a circumstantial foundation for the applicability of MRE 804(b), opting instead to advance the equally useful argument that the statements were excited utterances, the prosecution may well have successfully done so had this trial occurred after the release of Crawford when the import of dying declarations as exceptions to the Confrontation Clause became apparent. Then, if dying declarations prove to be accepted as historical exceptions to the Confrontation Clause, we would have no reason to resolve the close question here concerning whether the victim's statements were also made in the course of an ongoing emergency.

Therefore, I question the majority's decision to rest its precedential analysis of Crawford and Davis on a fact-intensive Court of Appeals decision that does not even consider the legal argument that is arguably most relevant to the outcome of this case post-Crawford. Moreover, the majority acknowledges that defendant should not be faulted for failing to raise the Confrontation Clause issue at trial because Crawford had yet to be decided. Ante at 20 n.. 17. Yet it fails to give the same consideration to the prosecution, which had equally little reason to presume that its choice between two formerly equal

theories for admission would become decisive on the basis of later-decided law. Even if the prosecution entirely abandoned its argument, why should we not give the parties the same consideration in light of the intervening changes in the law? At a minimum, I would not analyze the Confrontation Clause issue on the basis of the victim's excited utterances under these facts; in my view, if the prosecution had not abandoned its attempt to classify the statements as dying declarations, we likely would not have to reach the contentious question whether there was also an ongoing emergency under Crawford and Davis.

In conclusion, the Court of Appeals did not clearly err when it decided that the victim's statements were admissible because they were non-testimonial under Crawford and Davis. Further, particularly because the appeals panel made reasonable, close calls in answering the fact-intensive questions presented, I would not reverse its decision where the statements were also likely dying declarations that would be excepted from the rule of Crawford. Accordingly, I would affirm.

ROBERT P. YOUNG, JR., J., agrees.

FN1. Defendant, whose name is Richard, goes by the name "Rick," and the victim told the police that "Rick" shot him.

FN2. The jury acquitted defendant of first-degree murder.

FN3. The trial court's decision predated the United States Supreme Court's decisions in Crawford and Davis. The trial court denied defendant's motion to suppress the victim's statements to the police, holding that these statements were admissible under

the excited utterance exception to the hearsay rule, MRE 803(2).

FN4. The Michigan Constitution also guarantees criminal defendants the right "to be confronted with the witnesses against him or her...." Const 1963, art 1, § 20.

FN5. Although the focus here is on the statements made by the declarant to the interrogators, the interrogators' questions would nevertheless seem to provide necessary context in understanding the "primary purpose" of these statements.

FN6. The prosecutor argues that the victim's statements to the police are admissible because they fall within the excited utterance exception of MRE 803(2). However, this argument is clearly incompatible with the United States Supreme Court's decision in Crawford. As that Court indicated, "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence...." Crawford, 541 U.S. at 61. Instead, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at 68-69. See, also, McCormick, Evidence (6th ed), § 252, p 163, citing Crawford, 541 U.S. at 59 n. 8 ("While ... [the Crawford Court] suggested that dying declarations might be excepted for historical reasons, the Court took a different view of excited utterances (also known as spontaneous declarations).").

FN7. In its first opinion, the Court of Appeals stated, "The one question asked by the police-'what happened?'-does not constitute an interrogation and there is no evidence of interrogation." Bryant, supra at 2. In its second opinion, however, the Court of Appeals recognized that the police had, in fact, asked the victim multiple questions and that the victim's statements were "made in the course of a police interrogation." Bryant (On Remand), supra at 3. Indeed, the police admittedly asked defendant a "series of questions." In its second opinion, the Court of Appeals stated, "The questioning was used to establish ... whether the shooter ... followed [the victim] to the gas station...." Id. However, none of the officers testified that they ever asked the victim whether the shooter followed the victim to the gas station or any similar questions.

FN8. The dissent contends that the "time lapse" between the shooting and the questioning does not necessarily mean that the emergency was not ongoing when the questioning occurred. Post at 3. However, the dissent overlooks that part of Davis, 547 U.S. at 828-829, in which the Supreme Court concluded that once the defendant had stopped assaulting the victim and left the scene of the crime, the "ongoing emergency" was over. Applying that same reasoning to the instant case, the "ongoing emergency," at least in the Davis sense, was over once the victim was able to escape from defendant and drive six blocks to the gas station.

FN9. The fact that Davis held that the pertinent question is the statement's "primary purpose," rather than its "sole purpose," suggests that statements may be considered testimonial even though the statements may to some extent "enable police

assistance to meet an ongoing emergency." However, this matter need not be amplified upon in the present case.

FN10. Davis explained that "police conduct [cannot] govern the Confrontation Clause; testimonial statements are what they are." Davis, 547 U.S. at 832 n. 6. "Their saying that an emergency exists cannot make it be so." Id. In the instant case, the police conduct (although not dispositive) does not even remotely suggest that the police believed that an ongoing emergency existed while they were interrogating the victim at the gas station.

FN11. Contrary to the dissent's contention, post at 4 n 1, the police were specifically asked these types of questions. For example, one officer was asked, "When your partner parked the car, what did you do?" to which he responded, "I got out of the vehicle and I went towards [the victim]." This officer was then asked if he went "immediately" to the victim and the officer responded, "Yes, I did." This officer was then asked, "You didn't go into the [gas] station and ask what had happened or anything like that," to which he responded, "Negative, no." Then, the officer was asked, "What did [your partner] do upon parking the car?" to which he said, "He got out of the vehicle too [and walked] towards [the victim]." The officer was then asked, "While you're talking to [the victim], where is [your partner]?" to which he responded, "He was right there with me." The officer was also asked whether he was standing or kneeling, and he indicated that he was standing. Another officer was asked, "Where did [the officers] go" when they got out of their vehicles, and he indicated that they "all went to [the victim]." Yet another officer was asked, "Where were [the other officers] when you arrived?"

and he responded, "They were by [the victim]." This officer was then asked whether he "went straight to [the victim] or did ... something else," to which he responded, "I went straight to [the victim]." Then, this officer was asked, "You mean the entire time you were there you spent that entire time talking with [the victim], is that what you're saying," and he said, "The majority of the time there I did, yes." Another officer was asked, "So you get there and there's already two [sic] officers over near [the victim] on the ground and so you go over there also, correct," to which he responded, "Correct." This officer was then asked, "You didn't look around and say, gee, there might be a shooter around here, I better keep an eye open," to which he said, "I did not, no." Finally, another officer was asked, "And when you got there at the gas station what did you, what's the first thing you did?" to which he responded, "I approached the subject, the victim ... on the ground and asked him something like what happened." This officer was then asked, "Did your partner go with you?" and he responded, "Yes. Yes. He followed right behind me."

FN12. Some of the officers actually left the gas station to proceed to defendant's house even before EMS arrived. The dissent contends that the fact that the police called for backup assistance when they reached defendant's house indicates that there was an "ongoing emergency." Post at 4 n 1. Even if there was an "ongoing emergency" at defendant's house (which we do not concede since defendant was not even at his house when the police arrived), this "ongoing emergency" existed at defendant's house, not at the gas station at which the statements were made. Further, referring to the police investigation at defendant's house as an "ongoing emergency" for purposes of evaluating an alleged Crawford violation

is inconsistent with Davis, 547 U.S. at 828-829, as the Court concluded in that case that once the defendant had stopped beating the victim and left the premises, the "ongoing emergency" had ended, despite the fact that a dangerous criminal remained on the run. Under the dissent's approach, if there is an "ongoing emergency" anywhere (or even what the police perceive to be such an "ongoing emergency"), a victim's statements to the police are to be considered non-testimonial even if those statements are made away from the actual venue of this "ongoing emergency."

FN13. In Davis, 547 U.S. at 828, the Court discussed King v. Brasier, 1 Leach 199, 168 Eng Rep 202 (1779), in which "a young rape victim, 'immediately on her coming home, told all the circumstances of the injury' to her mother." Davis stated that "if the relevant statement had been the girl's screams for aid as she was being chased by her assailant," the statement would have been non-testimonial. Davis, 547 U.S. at 828. "But by the time the victim got home, her story was an account of past events," and, thus, the victim's statement to her mother was testimonial. Id.

FN14. The dissent contends that we must consider the "length of time between [the] initial event and [the] police questioning." Post at 5 n 2. Presumably, the shorter the time between the event and the questioning, the more likely that the statement should be considered non-testimonial. However, the United States Supreme Court has not directed us to consider the "length of time between [the] initial event and [the] questioning." Instead, it has directed us to consider whether the statements describe an event as it is "actually happening," or whether they

describe an event that has already "happened." Davis, 547 U.S. at 827. If the statements fall in the former category they are to be considered non-testimonial and if they fall in the latter category they are to be considered testimonial, says the Supreme Court. Id. Although the dissent may refer to this as an "artificial threshold," post at 4, it is, for better or worse, the "threshold" set by the Supreme Court, and is thus the threshold that we must follow here.

FN15. Just as Davis was not referring to any "ongoing emergency" occurring anywhere, see note 12 of this opinion, it was also obviously not referring to every imaginable type of "ongoing emergency." Instead, given that Davis concluded that the statements made while the victim was being assaulted did occur during an "ongoing emergency," but the statements made after the defendant stopped assaulting the victim and left the premises did not occur during an "ongoing emergency," it is clear that Davis used the term "ongoing emergency" in reference to the emergency presented by the pendency of the criminal event itself, not by its aftermath, including the purely medical aftermath. Davis, 547 U.S. at 828-829.

FN16. Both the prosecutor and the dissent argue that the instant case is distinguishable from Crawford because the Crawford interrogation was more formal, i.e., the interrogation was tape-recorded and it took place at a police station. However, Davis expressly stated that the protections of the Confrontation Clause are not limited to statements made during formal interrogations. Davis, 547 U.S. at 830. Further, we find it particularly telling that the three similarities between the instant case and Hammon

that are listed directly above are the exact same three similarities that the United States Supreme Court relied on to conclude that Hammon is significantly similar to Crawford. Id.

FN17. Before Crawford, as long as the hearsay statement was admissible under a "firmly rooted" hearsay exception, its admission did not violate the Confrontation Clause, Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), and the excited utterance exception is a "firmly rooted" hearsay exception, White v. Illinois, 502 U.S. 346, 355-356 n. 8, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). Because this was the state of the law when the trial occurred in this case, defendant's objection on the basis that the statements were not excited utterances, but not on the basis of a Confrontation Clause violation, was completely reasonable. Therefore, defendant cannot be faulted for failing to raise the Confrontation Clause issue at the trial. The prosecutor himself seems to agree:

> Given the importance of resolving this point of law to the jurisprudence of this state, the People see no reason to quibble about the adequacy of Defendant's presentation of the issue to the trial court. The trial in this matter preceded Crawford by more than a year, and trial counsel's motion in limine was adequate to place the admissibility of the testimony at issue.

FN18. In Crawford, 541 U.S. at 56 n. 6, the Supreme Court recognized that "[a]lthough many dying declarations may not be testimonial, there is authority for admitting even those that clearly are."

However, the Court concluded that "[w]e need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations," but "[i]f this exception must be accepted on historical grounds, it is sui generis." Id. In Giles v. California, --- U.S. ----, 128 S.Ct. 2678, 2682, 171 L.Ed.2d 488 (2008), the Supreme Court quoted Crawford, 541 U.S. at 54, for the proposition that "the Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.' " It then noted in dictum that one of the "forms of testimonial statements [that] were admitted at common law even though they were unconfronted" were dying declarations. Id.

FN19. MRE 804(b) provides, in pertinent part:
The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
* * *
(2) In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

FN20. The dissent contends, "The statements in this case seem admissible as dying declarations, thus potentially obviating much of the majority's analysis." Post at 2. We must point out initially that the United States Supreme Court has not yet held that dying declarations are admissible under Crawford. More significantly, however, and contrary to the dissent's contention, the prosecutor did more than merely fail to "establish[ ] the requisite foundation for a dying declaration," post at 9 n 5;

rather, he failed to appeal the district court's decision that the statement was not a dying declaration, and he explicitly conceded that there is a "lack of proof on whether the deceased knew he was dying at the time." In addition, even after Crawford and Davis were decided, the prosecutor still did not raise the dying declarations issue either with the Court of Appeals or with this Court until after this Court granted leave to appeal. On the other hand, defendant consistently argued that the victim's statements were inadmissible and that they were not dying declarations. In fact, when the district court ruled that the victim's statements were admissible, defendant asked the district court to clarify whether they were admissible as dying declarations or as excited utterances. In addition, during the trial, defendant asked the circuit court to ensure that the prosecutor refrain from referring to the victim's statements as the "dying victim's statements." While defendant did everything he could to ensure that the victim's statements were not admitted as dying declarations, the prosecutor did nothing equivalent to seek admission of the statements as dying declarations, and essentially conceded that the statements were not dying declarations. Therefore, to answer the dissent's question, post at 11, this is why we do "not [now] give the parties the same consideration" with regard to this issue.

FN1. The majority concludes that the officers did not subjectively perceive an ongoing emergency because they did not testify, for example, about "taking any actions to secure the area, to search the station for the possible presence of any armed individuals, or to provide cover for other officers." See ante at 12-14. I am wary of the majority's speculation concerning

police procedures, particularly because these officers testified before the United States Supreme Court decided Crawford or Davis. Therefore, the officers were not questioned to elicit their goals in questioning the victim or whether and how they had already determined that the shooter was not in the immediate area. In any event, the majority's reference to the officers' later call for backup assistance, ante at 14, cuts against the majority's conclusion; the officers' fear that defendant remained armed and dangerous confirms that their attempts to identify him and his location by questioning the victim were related to potential ongoing danger.

FN2. Further, the Court of Appeals conclusion that the emergency was ongoing here does not require us to conclude that an emergency is ongoing any time police seek to "apprehend a criminal before he might injure somebody else," thereby "effectively render[ing] non-testimonial all statements made before the offender was placed behind bars." Ante at 15. Rather, clearly the overall circumstances of the statements must control the court's determination whether the emergency was truly ongoing. The majority inappropriately takes the Court of Appeals analysis to its logical extreme instead of accepting the simple proposition that a length of time between an initial event and police questioning is a factor relevant to whether the emergency is ongoing; some lapse of time does not require the automatic conclusion that an objective observer would perceive the emergency as having ended.

FN3. I do not assert that "if there is an 'ongoing emergency' anywhere (or even what the police perceived to be such an "ongoing emergency"), a victim's statements to the police are to be considered

non-testimonial...." Ante at 14 n.. 12. Rather, I simply conclude that any apparent distance must be viewed in context.

FN4. Indeed, my disagreement with the majority centers on my conclusion that we should not reverse this case as a matter of law simply because the victim and the assailant were separated in some way where the Court of Appeals reached a supportable conclusion based on all the underlying facts. Whether the victim and the assailant are separated by a door (as in Hammon), by one block, by six blocks, or by ten blocks, the nature and persistence of the relevant emergency depend on the circumstances, including the type of danger or assault involved and the continued vulnerability of the victim (or others, when relevant) to further danger.

FN5. I disagree with the majority's secondary conclusion that the prosecution necessarily conceded that the statements were not dying declarations. See ante at 25. The prosecution did pursue only the excited utterance theory and admittedly never established the requisite foundation for a dying declaration. But I am not convinced that the prosecution's statement that there was a "lack of proof on whether the deceased knew he was dying at the time" constituted a concession that the victim's statements could never be considered dying declarations. See ante at 24 n.. 20. The prosecution may have been admitting only that it could not support an argument on this point because it had not chosen to undertake the potentially difficult task of establishing the requisite proofs. In any event, the prosecution's failures in these regards exemplify my primary concern: that the majority here creates bad

law from bad facts resulting from the incomplete nature of the record.

OPPOSITION BRIEF

In The
Supreme Court of The United States
October Term, 2008
No. 09-150

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner,

Vs.

RICHARD PERRY BRYANT
Respondent.

On Petition for Writ of Certiorari
To the Michigan Supreme Court

Brief in Opposition to Petition for Writ of Certiorari

PETER JON VAN HOEK*
Assistant Defender
State Appellate Defender Office
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833

---

*Counsel of Record

Table of Contents

Index of Authorities..... 1

Statement of Material Facts and Proceedings..... 2

Response to Reasons for Granting the Writ..... 3

Summary..... 12

Index of Authorities

Collins v. State, 873 N.E.2d 149 (2007)..... 4

Crawford v. *Washington*, 541 U.S. 36 (2004)..... 3

Davis v. Washington, 547 U.S. 813 (2006)..... 3

People v. Casique, unpublished opinion of California Court of Appeals, No. A113636... 4

Statement of Material Proceedings and Facts

Respondent concurs with the Statement of Material Proceedings and Facts included within the Petition for Writ of Certiorari, except to add that Mr. Covington told the investigating officers that the shooting occurred at a location six blocks from the gas station and approximately 30 minutes prior to the arrival of the police. The evidence of these out-of-court statements was admitted at Respondent's trial, over defense objection, as excited utterances under Michigan Rule of Evidence 803(2).

Response to Petitioner's Reasons for Granting the Writ

In the Petition to this Court, Petitioner argues that the Court should grant the writ and subsequently overturn the decision of the Michigan Supreme Court, which applied this Court's authority of *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006), to hold that the alleged statements made by the declarant in this matter in response to police questions were testimonial and thus inadmissible under the Confrontation Clause of the Sixth Amendment in the absence of any opportunity for Mr. Bryant to cross-examine the declarant. This Court should deny that request, as Petitioner has failed to establish sufficient grounds for granting of the writ, and has seriously misconstrued the holdings in *Crawford* and *Davis*. In essence, Petitioner is asking this Court to apply the rulings in those cases to the factual situation in the case at bar and reach a different result than the Michigan Supreme Court majority, or grant the writ in order to revisit constitutional principles already decided, primarily in *Davis* and its companion case of *Hammon v. Indiana*. Neither of these arguments present reasons for this Court to grant the writ.

Under Supreme Court Rule 10, a writ of certiorari should only be granted for "compelling reasons," such as a direct conflict between United States courts of appeals on a common question, a conflict between a United States court of appeals and a state court of last resort, conflicts on an important federal question between state courts of last resort, or a decision of a United States court of appeals or state court of last resort on an important question of federal that has not as yet been settled by this Court. The rule notes that a grant of a writ is rare where the only question raised is whether the lower court properly applied an established rule of law to the facts of a particular case.

Application of these standards reveals why the present petition should be denied. Petitioner has failed to document any conflict in or between the Federal courts of appeals or state courts of last resort on the factual or legal matters raised in this case. The only cases cited in the petition, other than *Crawford, Davis, and Hammon*, are two decisions from state intermediate appellate courts (one of which is even unpublished) which Petitioner asserts show a sufficient conflict with the Michigan Supreme Court's decision in the instant case to justify review by this Court.[1] The lack of any showing of a conflict on these questions among the Federal Circuit Courts of Appeals and state courts of last resort exposes the current petition for what it really is – an effort by Petitioner to have this Court merely overturn the application of the *Crawford* and *Davis* decisions to the facts of the present case. That effort should be rejected.

Even if this Court were to review the decision of the Michigan Supreme Court in its application of *Crawford* and *Davis* to the facts of the present case, that decision should be upheld, as it accurately and fairly applied those precedents to find that Mr. Bryant's constitutional right to confrontation was violated by the admission at trial of the declarant's out-of-court statements. Petitioner's arguments seriously misconstrue the decisions of this Court, and seek to assert positions which the majority of this Court have already explicitly rejected.

---

[1] In each of these two cases, the respective courts basically applied the rulings in *Crawford* and *Davis* to the particular facts of their case. *Collins v. State*, 873 N.E.2d 149 (2007); *People v. Casique*, unpublished opinion of California Court of Appeals, No. A113636. In neither case did the respective appellate court question the legal principles expressed in *Crawford* or *Davis*, or call for a reconsideration of those opinions. While in both cases the courts found the out-of-court statements of the declarants to be non-testimonial and admissible, there were facts in each case that are clearly distinguishable from the instant case. In *Collins*, the Indiana Court of Appeals noted that the statement made to a 911 dispatcher discussed the possible present location of the suspect, and what type of car he then might be driving, facts the Court held were relevant to a possible ongoing emergency. 873 N.E.2d at 154-155. In *Casique*, the California Court of Appeals recognized that in questioning the declarant, the police officer "did not solicit a description of the events or seek to discover any details of the shooting." 2009 WL 1508463, p. 14. The record of the case at bar shows that no portion of the declarant's statement discussed the possible present location of his assailant, and that the police repeatedly asked the declarant to relate the circumstances and details of the shooting, which had allegedly occurred 30 minutes earlier.

The majority of the Michigan Supreme Court correctly recognized that Petitioner's arguments conflicted with this Court's rulings in the controlling authority. Petitioner has presented no compelling reasons for this Court to now question or revisit this recent precedent.

The basic flaw in Petitioner's arguments is their failure to acknowledge that this Court's use of the term "ongoing emergency" in the *Davis* opinion was in reference to whether the alleged criminal conduct in the case was actually occurring at the time of the declarant's statement, rather than conduct that had concluded prior to the statement being made, and not to whether the declarant suffered wounds and thus was in a medical emergency at the time of the statement. There is no discussion in *Crawford, Davis, or Hammon* concerning an exception to the Confrontation Clause where the declarant is injured or in need of medical attention. To the contrary, the Court's use of the term "emergency," in the context of these decisions, relates to the content of the declarant's statement – whether it is a call for immediate help so that the police can intervene and halt an ongoing crime, as in *Davis, supra*, or a description of past events to assist the police in identifying and apprehending the offender, as in *Crawford* and *Hammon*. This Court in *Davis* ruled that the question of whether a statement is testimonial for the purposes of the Confrontation Clause is resolved by examining the objective circumstances, with the primary consideration being the substance of the declarant's statement, to determine whether the primary purpose of the police questioning was "establish or prove past events potentially relevant to later criminal prosecution." 547 U.S. at 822. In the instant case, all of the objective circumstances of the declarant's alleged statements demonstrate that the primary purpose of the police questioning was to investigate a past event. The Michigan Supreme Court correctly held that under this Court's rulings, the statements obtained were testimonial, and thus inadmissible at

trial, as Mr. Bryant had no opportunity (the declarant died hours after receiving the wound) to cross-examine the declarant.[2]

There was no dispute in the case that the charged offense did not occur at the time or place of the police questioning, nor that the alleged shooter was not at the gas station when the police arrived in response to a call that a man had been shot. To the contrary, according to the statements attributed to the declarant, the shooting occurred some 30 minutes prior to the questioning, at a location six blocks away. There was never any indication from the declarant to the police that the alleged crime was ongoing at the time of the statement, that the offender was present or posed any current or continuing threat either to the declarant, the police, or bystanders, or a statement to the police seeking for them to intervene and halt an ongoing crime. The entirety of the statement concerned alleged events that had already concluded.

Even viewing the actions of the police alone, based on the officers' own testimony, demonstrates that they did not have any objective or subjective belief or fear that there was an ongoing crime, or danger to their safety, at the time of the questioning. Petitioner posits that "for all the police knew, the shooter could have been right at the scene." Petition at 8. As the Michigan Supreme Court recognized, however, the actions of the five officers who responded to the call belie any conclusion that they feared for their safety or that of the declarant, or suspected that a shooter was then present at the gas station. **None** of the officers drew their weapons upon arrival at the scene, began a search of the area, nor questioned other people at the scene as to whether there was any ongoing crime or dangerous persons present. Instead, all five engaged in questioning the declarant during the short time prior to the arrival of medical personnel, who had

---

[2] The opinion of the Michigan Supreme Court, which is attached as an appendix to the Petition, shows that that Court rejected Petitioner's effort to reconfigure the issue presented in the case to a question of whether an exception exists or should exist under *Crawford* for statements

been summoned to the scene along with the police. Contrary to Petitioner's insinuations that Respondent has been critical of the police conduct in the case, there has never been an assertion of police misconduct in this case, nor is that question relevant to the issue of the admissibility of the statement. This Court in *Davis* noted that the characterization of statements as either testimonial or non-testimonial does not impugn the police investigation which elicited the statements:

> While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory **collection** of, *ex parte* testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

547 U.S. at 832, fn. 6. (Emphasis in original).[3]

These officers acted appropriately in regards to the situation – upon arriving after the occurrence of alleged criminal conduct the officers sought to question a witness to that conduct in order to identify, apprehend, and aid in the possible prosecution of an offender. The real, and only, issue in this case is whether the statements they elicited from the declarant through this investigative questioning were later admissible in the absence of an opportunity to cross-examine the declarant. Under this Court's authority, that issue was correctly decided by the Michigan Supreme Court.

Petitioner criticizes the decision of the Michigan Supreme Court's majority in focusing on the undisputed fact that the entirety of the declarant's statement referred to events that

---

admissible under state evidentiary law as dying declarations, and Petitioner has not raised nor argued that question in the present petition.

[3] In their opinion, the Michigan Supreme Court majority expressly cited to footnote 6 of the *Davis* decision (38A, fn. 10), and at no point criticized the police actions in this case or found any police misconduct.

occurred prior to the time of the statement, and then makes the unsurprising statement that the state cannot prosecute persons for crimes that have not yet occurred. Petition at 10. Petitioner errs, however, in construing the *Davis* decision as based on a distinction between past and future events. In fact, the critical distinction made in *Davis* and *Hammon* was between past and **current** events – a plea for assistance during an ongoing crime as compared to a description of prior, completed events.

Petitioner's arguments as to what this Court decided in *Davis*, or why this Court should now revisit and redefine that decision, are both internally inconsistent and contrary to this Court's rulings. While Petitioner recognizes that this Court held that "testimonial statements are those given with a view toward recording the declarant's version of events that have already transpired, for the purposes of memorializing it," Petitioner then asserts that non-testimonial statements should include both "spontaneous statements either made during the course of an event, or to discuss or describe a recent event to one who was not there." Petition at 10, 11. Petitioner does not explain how or where the constitutional line can or should be drawn between statements recording the declarant's version of events which have already transpired and statements describing a recent event to one who was not there, other than to assert there is an outcome-determinative difference between a declarant making an oral statement outlining the prior events to a police officer who has arrived at the scene and a more formalized, written statement given to an officer at a police station. That assertion is directly contrary to this Court's decision in *Davis*, where the Court majority rejected the argument that testimonial statements are confined to those taken during formal or written questionings, or at some location away from the alleged crime scene:

> The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps

> notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" * * * But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial. 547 U.S. at 826, 832.

If Petitioner's interpretation of the Confronation Clause is correct, the statement taken in *Hammon* – given orally to an officer responding to a report of a domestic violence situation at the scene of the alleged crime only minutes after its occurrence – would have been found non-testimonial and admissible, under Indiana evidentiary law, as an excited utterance. This Court ruled that those circumstances – the location, timing, and formality of the questioning – did not render a statement whose substance related solely to prior events, and given in response to police questioning, non-testimonial. Likewise, the Michigan Supreme Court held in the case at bar that the objective circumstances of the statement, given after the occurrence of the events, at a different location, in response to police questions, and recorded in the memory of the investigating officers, established that the statement was testimonial. That decision fully comports with this Court's ruling in *Davis*. Petitioner has presented no compelling grounds for this Court to reconsider that ruling.

Petitioner further asserts that any statement made during a 911 call to the police qualifies as non-testimonial under *Crawford* and *Davis*, and as the statement at issue in this case could have been made via a 911 call had the declarant then possessed a cell phone, this statement should equally be deemed non-testimonial. Petition at 10. Again, Petitioner misconstrues this Court's holding in *Davis*. It is not the manner in which the statement is communicated to the police, but the substance of the statement that is the crucial element in the determination of the status of that evidence. In *Davis* this Court recognized that the fact the declarant's statement was made during

a 911 call to a police operator neither automatically rendered that statement non-testimonial nor qualified the entire statement as non-testimonial. While Justice Scalia's majority opinion noted that ordinarily 911 calls "describe current circumstances requiring police assistance" rather than establish or prove past events, 547 U.S. at 827, the substance of the particular statements made during the call will determine whether they are testimonial or not under the Sixth Amendment, not merely the fact that a telephone was used to contact the police. Justice Scalia expressly wrote that where the objective circumstances change during a 911 call, that portion of the call which comes after the changed circumstances could be rendered testimonial, despite having been made during that same call:

> This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," 829 N.E. 2d, at 457, once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*...[4]

547 U.S. at 828-829.

Petitioner's argument that the declarant's statements in this case would have been admissible under *Davis* had he made "precisely the same statements" to a 911 operator via a phone call rather than in person to responding police officers cannot be reconciled with the above language.

The Michigan Supreme Court correctly interpreted and applied the *Crawford* and *Davis* rulings to the particular facts of this case. The record establishes that there was no ongoing criminal activity or continuing threat at the time the statements were made, and thus no emergency, as that term is defined for the purposes of these precedents. The substance of the statements attributed to the declarant did not include any spontaneous call for assistance in an ongoing crime, but instead were confined to descriptions of the circumstances of past, completed events. The objective actions of the police showed they were investigating an alleged prior crime rather than focusing on determining if a present threat or emergency existed. The statements made to the officers, concerning what, when and where the alleged crime happened, and who committed the offense, were "an obvious substitution for live testimony, because they do precisely **what a witness does** on direct examination; they are inherently testimonial." 547 U.S. at 830. (Emphasis in original).

Petitioner has failed to provide compelling reasons for this Court to grant the writ. The Michigan Supreme Court accurately recognized this Court's holdings in *Crawford* and *Davis*, and correctly applied those rulings to the individual facts of this case. The petition does not meet the standard for certiorari under Rule 10, and should be denied.

---

[4] Under this analysis, any statements made during the latter portions of the 911 call, after Mr. Davis drove away from the scene and thus no longer posed a current threat to the declarant, would have been testimonial, despite the fact that the alleged violent offender was then at large in the community. Under Petitioner's reading of *Davis*, the "emergency" would be ongoing until such time, be it minutes, hours, or days, that the suspect was apprehended. Again, this Court has already expressly rejected such a broad exception to the Sixth Amendment right to confrontation.

Summary

WHEREFORE, for the reasons stated, Respondent asks this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

PETER JON VAN HOEK
Assistant Defender
State Appellate Defender Office
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833

Dated: September 3, 2009.

JOINT APPENDIX

Supreme Court, U.S.
FILED
APR 20 2010
OFFICE OF THE CLERK

No. 09-150

In The Supreme Court of the United States

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

RICHARD PERRY BRYANT,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

JOINT APPENDIX

KYM L. WORTHY
Wayne County
Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research,
Training, and Appeals

LORI BAUGHMAN PALMER
(*Counsel of Record*)
Assistant Prosecuting Attorney
WAYNE COUNTY
PROSECUTOR'S OFFICE
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-2698
email: lpalmer@co.wayne.mi.us

Attorneys for Petitioner

PETER VAN HOEK
(*Counsel of Record*)
STATE APPELLATE
DEFENDER'S OFFICE
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833
email: peter@sado.org

Attorney for Respondent

Petition For Writ Of Certiorari Filed July 28, 2009
Certiorari Granted March 1, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Trial Court Docket Entries 2

Court of Appeals Docket Entries 3

Preliminary Examination Testimony of Officer Scott Pellerito 5

Motion to Suppress 26

Suppression Hearing Testimony of Officer Wayne Brown 29

Trial Court Order Granting Motion to Admit Statements 72

Trial Testimony of Officer Michael McCallister 73

Trial Testimony of Sgt. Jeffery Wenturine 97

Trial Testimony of Officer Joseph Stuglin 124

Michigan Court of Appeals Opinion 147

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear in the following pages in the Appendix to the Petition for Certiorari:

Michigan Court of Appeals Opinion, August 24, 2004 ..... 1A

Michigan Supreme Court Opinion, June 10, 2009 ..... 8A

RELEVANT DOCKET ENTRIES

District Court

04/26/2002 Preliminary examination
Held: Bound Over

Circuit Court

09/03/2002	Jury Trial (Motion Heard)
09/04/2002	Jury Trial In progress
09/05/2002	July Trial In progress
11/26/2002	Jury Trial In Progress

Michigan Court of Appeals

08/24/2004	Opinion – Per Curiam – Unpublished Result: L/Ct Judgment/Order Affirmed
12/01/2006	Re-Submitted Per Supreme Court Remand
03/06/2007	Opinion – On Remand Sct – Per Curiam – Unpublished Result: L/Ct Judgment/Order Affirmed

Michigan Supreme Court

10/31/2006	**Remand to COA** **Comments: for reconsideration in light of Davis**
09/17/2008	**SCt Order: Grant Application**
06/10/2009	**SCt Opinion – Leave Granted – Reverse COA**

STATE OF MICHIGAN

IN THE 36TH DISTRICT COURT
FOR THE CITY OF DETROIT

CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

vs.

RICHARD P. BRYANT,

Defendant. /

36th District Court
No. 01 65056
CC. 02-5508

PRELIMINARY EXAMINATION

BEFORE THE HONORABLE
NORMA DOTSON, DISTRICT JUDGE

Detroit, Michigan – Friday, April 26, 2002

APPEARANCES:

For the People: MR. KENNETH E. SIMON
(P32004)
ASSISTANT WAYNE COUNTY
PROSECUTING ATTORNEY

For the Defendant: MR. BRIAN E. SELBURN
(P29749)
ATTORNEY-AT-LAW

REPORTED BY: Sharon F. Bertges, CSR-2009
Certified Shorthand Reporter
(313) 965-8728

* * *

[7] THE COURT: If there are any other officers in the Courtroom, anybody, anyone going to be a witness in the trial, please step out in the hall.

MR. SIMON: He is stepping out, now, Your Honor.

OFFICER PELLERITO: Scott Pellerito, P-e-l-l-e-r-i-t-o.

THE COURT: Raise your right hand, please.

THE CLERK: Do you solemnly swear or affirm that the testimony you are about to give in this matter, will be the truth, so help you, God?

OFFICER PELLERITO: I do.

SCOTT PELLERITO,

Called as a witness at approximately three-ten p.m., sworn by the Clerk, was examined and testified as follows:

THE COURT: Take a seat in the witness box, please.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. SIMON:

Q Tell us your name and occupation for the record, please.

A My name is Scott Pellerito. I am a Detroit Police Officer, assigned to the Fifth Precinct.

Q How long have you been a police officer?

A Almost three years.

Q Officer Pellerito, were you on duty back on April 29, 2001?

[8] A Yes, sir.

Q Back on that date, did you have occasion to go to Mack and Cadillac at a gas station there on a radio run?

A Yes, I did.

Q What was it that caused you to go there?

A We received a police run to Cadillac and Mack on the One Price Gas Station, or, correction, it was Price Gas Station, on a shooting.

Q And, when you got there, what did you observe, Officer?

A I observed a vehicle parked close to the doors with the Complainant laying on the ground.

Q Was that person either, at that time or later, who was identified to you as Anthony Covington?

A Yes.

Q Did either you or your – you had a partner with you at that time?

A Yes, sir.

Q Did either you or your partner, in your presence, speak to Mr. Covington?

A Yes, sir, I did.

Q Did you ask Mr. Covington – well, strike that.

What appeared to – what did Mr. Covington's physical condition appear to be?

A He was in a state of shock, excited, rapid breathing.

MR. SELBURN: Your Honor, I'm going to object [9] to the testimony regarding "State of shock." I think that is a medical condition that would require medical testimony.

MR. SIMON: I suppose it could be a medical term, but I think lay persons use that kind of term, also.

I'm not asking the Court to accept it as a medical opinion. To offer it just, what the officer saw.

THE COURT: I'm going to overrule the objection and allow the answer.

Q (By Mr. Simon, continuing) I'm sorry. What condition was Mr. Covington in?

A He appeared like he was in a state of shock. He was excited, breathing rapidly. Like I said, he was lying on the ground, clenching his abdomen.

Q Did Mr. Covington tell you what the cause of that condition was?

MR. SELBURN: Your Honor, I will object. Hearsay.

MR. SIMON: Your Honor, in this exam, we're going to introduce, obviously, evidence that Mr. Covington died. Either the utterance, by Mr. Covington, with a dying declaration, if Mr. Covington knew that he was or suspected that he might die or in the case the Court hears evidence that is considered insufficient to believe that Mr. Covigton thought he might die, at the very least, [10] at the very least, this is excited utterance, talking about the cause of his condition.

THE COURT: Counsel, you have some law you want to read to me? Go ahead, read it to me.

MR. SELBURN: Well, Judge, there has been no showing that this is a dying declaration, so to speak. Declaration made under the impending death. There is absolutely no showing of that at all.

And, as far as it being an excited utterance, Judge, there is no showing that the excitement, if there is even excitement, that we – that I don't think we have seen – we don't know the cause of that, the source of that. There is no time frame given here. We don't even know what time this occurred.

THE COURT: I'm going to sustain the objection for a better foundation.

Q (By Mr. Simon, continuing) What time of day or night was that?

A It would have been early morning.

Q Would you like to refer to your report to refresh your memory as to exact time?

A Yes.

Now that I read my PCR, refreshing my recollection, it was approximately three-twenty in the morning.

Q Three-thirty (sic) in the morning. All right.

[11] And did, other than Mr. Covington's excited mental state you talked about, physically, was there – did there appear to be something wrong with him? Did you see any blood or anything like that?

A It appeared that he had a gunshot wound to the abdomen.

Q To the abdomen?

A Yes.

MR. SELBURN: Objection, Your Honor. I think that calls for medical testimony or, at least, better foundation.

MR. SIMON: I was going to ask more questions about that.

THE COURT: I'm going to sustain – delay ruling, reserve ruling on the objection to listen to the testimony.

Q (By Mr. Simon, continuing) Why did you believe Mr. Covington had a gunshot wound?

A As I testified before, he was clenching his side. He was bleeding and it appeared like he was, based on my experience on the Department, I have seen gunshot wounds before, and to me, it appeared that he a gunshot wound to his abdomen.

THE COURT: I'm going to overrule the objection.

MR. SIMON: All right. Thank you, Your Honor.

Q (By Mr. Simon, continuing) Did Mr. Covington tell you [12] that he had been shot?

A Yes.

MR. SELBURN: Objection, hearsay.

MR. SIMON: Well, Your Honor –

THE COURT: (Interposing) I'm going to allow it at this stage.

MR. SIMON: Thank you, Your Honor.

THE COURT: Excuse me. I'm going to allow his testimony. So, we don't have to have any continuing objections. And, your objection will be noted as being continuing, ongoing.

MR. SELBURN: Judge, if we could, I believe Mr. Simon was producing this under two different rules of evidence. And, for the record, we should have some type of ruling as to which rule of evidence this is being allowed in under.

THE COURT: At this stage, I'm going to allow it under the excited utterance. There has been testimony that the victim appeared to be, first of all, that there was a police run regarding a shooting. And that when they arrived, that they found the victim, Anthony Covington, I believe, on the ground. That he was holding his stomach. That he was bleeding and he appeared to be in shock. So, at this stage, I'm going to allow these statements as an excited utterance.

[13] Q (By Mr. Simon, continuing) Did Mr. Covington, tell you and your partner, how he had been shot? What happened to him?

A Yes.

Q What did he say concerning how he had gotten shot?

A He said, "Rick shot me."

Q "Rick shot me"?

A Yes.

Q Did he say where this had taken place?

A I – on Pennsylvania.

Q Do you – did you note for your report a specific address on Pennsylvania that Mr. Covington told you about?

A Yes, I did.

Q Do you have your report there?

A Yes. It is 4203 Pennsylvania.

Q You remember that without referring to it?

A Yes.

Q 4203 Pennsylvania?

A Yes.

Q That is where Mr. Covington said he was shot at?

A Yes.

Q All right. Did he say anything else about the details? In other words, that he was inside or outside that address?

A He stated he made the location in the front and knocked on the door. Had a conversation with this Rick person [14] and recognized him as such, based on his voice, and he said at that point, gunshots came from inside the house through the door.

Q And, did Mr. Covington give any other details about having been shot?

A Not that I recall.

Q Did he – do you recall whether he said this happened a few minutes, half hour, twenty minutes? How long before that?

A It had happened, according to him, a few minutes prior to us getting our police run.

Q A few minutes prior?

A After the situation, he drove himself to the gas station, which is located within a couple blocks.

Q All right. And, as far as identity of the person who shot him, he said, Rick, from 4203 Covington (sic)?

A Yes.

MR. SIMON: I have nothing further, Your Honor.

THE COURT: Excuse me. I have a question before you get started. You said that – Counsel, your last question, you said "4203 Covington."

MR. SIMON: I'm sorry. I mixed that up, Your Honor.

Was that – may I ask the question again, Your Honor?

[15] THE COURT: Yes.

Q (By Mr. Simon, continuing) What address was that?

A 4203 Pennsylvania.

Q 4203 Pennsylvania.

MR. SIMON: Thank you, Your Honor. I'm sorry.

CROSS EXAMINATION

BY MR. SELBURN:

Q What time did you get the radio call?

A Three twenty-four in the a.m.

Q That is when you received the call?

A Yes.

Q And, who was your partner?

A Officer Wayne Brown.

Q Wayne?

A Wayne Brown, yes, sir.

Q When – how long did it take you to arrive? Until you arrived at the location?

A Within two, three minutes.

Q And, when you arrived there, what did you observe?

A I observed the Complainant, Mr. Covington, laying on the ground. He was laying on his side next to his vehicle with the driver's side door ajar. And, as I stated before, he was clenching his abdomen.

Q Okay. Was the car door open?

A Yes.

[16] Q And, he was laying on his side?

A Yes.

Q Which side?

A His right side, I believe.

Q Did he complain to you about pain?

A He didn't state anything about pain, no, sir.

Q Did you see him do anything physically that would indicate pain, like making any gestures with his face or his body that would be an indication of pain?

A Well, I – well, as I testified before, it appeared like he was in a state of shock. He was holding his abdomen as, obviously, had a wound there.

Q Nothing else? You didn't see him wince or anything of that nature?

A Wince? You have to –

Q You didn't see his face go like that or anything like a clenching gesture, as if he were in pain?

A I don't recall, sir.

Q He didn't double up his body?

A He was just laying on his side, holding his – holding his side.

Q Should I take that as, no, he didn't double up his body?

A Yes.

Q And, he was conscious?

A Yes.

[17] Q And, did he appear alert?

A Yes.

Q Who first approached him? You or your partner?

A Actually, Scout Five-Eight made the location just prior to us pulling up. So, it would have been one of those two officers.

Q Were those officers already at the side of this man, laying on the ground, when you arrived?

A No, I think they had just pulled up, got out of the car, and we pulled in the gas station the same time.

Q All right. Okay. Well, when he asked you earlier what was the scene that you saw, didn't mention another scout car?

A Okay.

Q But, that was already there?

A Yes.

Q Were those officers already out of their car?

A I just said they just had gotten out of their car as we pulled up.

Q And, did those officers – so, they went to where – where other – where did they go? From the other scout car?

A They went to the scene where the victim was.

Q So, all the officers, your – the officer in your and in the other car all went to this man?

A Yes.

[18] Q Did you or someone else speak to him first?

A I believe I did, sir.

Q And, was he responsive?

A Yes.

Q Okay, what did you ask him? What was the first thing you asked him? His name?

A Yes.

Q And, he knew his name?

A Yes.

Q Did he have any difficulty speaking?

A Uh, yeah, he was breathing really heavy, kind of like in a panic state. Just a high, rapid breathing, and he was kind of talking low.

Q All right.

A He wasn't really clear when he spoke.

Q He wasn't real clear?

A But, I could understand what he was saying.

Q I am sorry. What was that?

A I could understand what he was saying.

Q Did you have to get up close to him to hear what he had to say?

A Not too close. A couple feet.

Q Did it appear that his difficulty in speaking was a result of his injury?

A Yes.

[19] Q After you determined who he was, what was the next thing you asked him?

A Asked him what happened.

Q You didn't ask him about his physical condition?

A I asked him what happened.

Q You didn't ask him about his physical condition?

A No. I could see his physical condition.

Q You could see it.

He was holding a wound?

A Yes.

Q But, if he is holding a wound, you couldn't see the wound, could you?

A He did show me the wound.

Q He showed you the wound?

A Yes, sir.

Q Was that after he gave you his name?

A I don't recall whether it was before or after.

Q Okay, did he have clothing on?

A Yes.

Q Did he have to remove his clothing for you to see the wound?

A I believe he could just pull his shirt up.

Q He did that?

A Yes, sir.

Q You didn't do that?

[20] A I don't recall doing it, no, sir.

Q Did he remain stationary?

A He may have rolled on his back and then back to his side. He didn't get up and run around, no.

Q Okay. Did you tell him, "Don't move"?

A Yes.

Q You encouraged him to remain stationary?

A Right.

Q Was an ambulance called?

A Yes.

Q By whom, if you know?

A On the shooting, automatically, if we tell dispatch that it is a good shooting, they automatically send EMS. In fact, they usually send them before we even arrive.

Q Did you tell this man that help was on its way?

A Yes, sir.

Q Did he respond to that?

A He may have said okay. I don't –

Q Did you tell him, "Hang in there. You are going to be okay"?

A No.

Q You didn't tell him that.

Did anyone else tell him that?

A No.

Q Now, you asked him what happened. And what was the first [21] thing that he said when he told you what happened?

A "I was shot."

Q Did you ask him any questions after that or did he continue on in a narrative?

A I asked him who shot him.

Q And, he told you what?

A Rick.

Q He didn't give you a last name?

A No.

Q He didn't give you any other identifying information about Rick?

A No.

Other than the location where he was shot at.

Q Okay. And, he then told you, he gave you the address and said it was at 4203 Pennsylvania?

A Yes.

Q Those were his words?

A Yes.

Q Did he tell you why he got shot?

A Just the circumstances that I testified earlier.

Q Did he tell you why he got shot?

A No.

Q And, he didn't tell you he saw who shot him did he?

A No.

Q In fact, he told you that he was shot through a door?

[22] A Yes.

Q Did he tell you how he had gotten from the Pennsylvania address to the gas station at Mack and Cadillac?

A I don't believe he directly said, but, I assume he drove his car there, based on the scene.

Q Okay. What is the distance, if you know? Are you familiar with that area?

A Yes.

Q Okay, can you tell us what the distance is from 4203 Pennsylvania to that intersection where the gas station is?

A I would have to guesstimate, approximately, three, four blocks.

Q Did he tell you any of the circumstances that led up to him being shot at 4203 Pennsylvania?

A Yes.

Q What is it that he told you?

A He said that he knocked on the front door, had a conversation with a man inside who he identified as Rick, and he said – I don't know the circumstances of the conversation, but, he recognized him

based on his voice and said he was shot through the door.

THE COURT: Excuse me, Officer. Would you speak up, please?

THE WITNESS: Oh, sure.

[23] THE COURT: Is it on? Hold it in your hand, please.

Q (By Mr. Selburn, continuing) He said he knocked on the door?

A Yes.

Q Did he indicate to you that the door was not open?

A No. From all understanding, it was not.

MR. SELBURN: Okay, if I can have just a moment?

(Brief pause in the proceedings.)

MR. SELBURN: I believe I have nothing further of this witness at this time, Your Honor.

MR. SIMON: No redirect, Your Honor.

THE COURT: Do you have any other –

MR. SELBURN: No.

THE COURT: Counsel, any other need for this witness?

MR. SIMON: No, Your Honor.

THE COURT: Thank you, sir. You are excused. You may step down.

(Whereupon the witness was excused from the stand at approximately three-thirty p.m.)

THE COURT: Do you have any other witnesses?

MR. SIMON: Yes, Your Honor. One more. Before I do, I have three stipulations. The subject of one of them is the report that Counsel is reading,

* * *

STATE OF MICHIGAN
IN THE 3RD JUDICIAL CIRCUIT FOR
THE COUNTY OF WAYNE

PEOPLE OF THE
STATE OF MICHIGAN

Plaintiff,

vs.

RICHARD P. BRYANT

Defendant.

Case No. 02-5508

Hon.
George W. Crockett III

MICHAEL DUGGAN
(P35893)
Wayne County Pros. Atty.
1441 St. Antoine,
12th Floor
Detroit, MI 48226-2302
(313) 224-5789

BRIAN E. SELBURN
(P29749)
Attorney for Defendant
17336 Harper Ave.,
Ste. 129
Detroit, MI 48224
(313) 885-8701

MOTION TO SUPPRESS/EXCLUDE/ STRIKE HEARSAY EVIDENCE

NOW COMES DEFENDANT, RICHARD P. BRYANT, by his attorney, BRIAN E. SELBURN, and, pursuant to MCR 6.110(D), moves this Court for an order to suppress/exclude/strike hearsay evidence in this cause for the following reasons:

1. That defendant is charged with Murder, First Degree, Premeditated, Felony Firearm and Firearm in Possession by a Felon.

2. That on 4-26-02 a preliminary examination was held in the 36th District Court, the Hon. Norma Dotson presiding.

3. That during said exam the prosecution offered certain hearsay evidence, i.e., statements made by the decedent.

4. That the defendant objected to said evidence offered as excluded by the general hearsay exclusion rule, MRE 802.

5. That the court overruled the defense objection to said evidence citing the so-called excited utterance exception, MRE 803(2).

6. That said evidence does not meet the requirements of MRE 803(2) and should be excluded.

7. That MCA 6.110(D) gives this court authority to determine this question and conduct an evidentiary hearing if necessary.

WHEREFORE, DEFENDANT, RICHARD P. BRYANT, by his attorney, BRIAN E SELBURN requests this Court to enter an order to suppress/ exclude/strike hearsay evidence in this cause.

Dated: 6-7-02

Respectfully submitted,

/s/ Brian Selburn

BRIAN E. SELBURN
(P29749)
Attorney for Defendant
17336 Harper Ave., Ste. 129
Detroit, MI 48224
(313) 885-8701

STATE OF MICHIGAN

IN THE 3RD JUDICIAL CIRCUIT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN	)	
vs.	)	File No. 02-5508
RICHARD BRYAN, [Perry]	)	
Defendant.	)	

JURY TRIAL - VOLUME I

Proceedings had and testimony taken in the above-entitled matter before the Honorable THOMAS BROOKOVER, 3rd Judicial Circuit Court Judge, at Detroit, Michigan, on Tuesday, September 3, 2002.

APPEARANCES:

KENNETH SIMON
Assistant Prosecuting Attorney

Appearing on behalf of the People of the State of Michigan

BRIAN SELBURN
Attorney at law

Appearing on behalf of the Defendant Richard Bryant

Linda M. Cavanagh, CSR-0131, RPR, CM,
Official Court Reporter

* * *

[6] MR. SIMON: Your Honor we have two officers here, at least they were here a little while ago. Officers Wayne Brown and Sergeant Jeff Wenturine.

THE COURT: Who do you want first?

MR. SIMON: I'm going to call Officer Wayne Brown first.

THE COURT: Need Officer Brown, I guess not the other one.

COURT OFFICER: Yes, sir.

MR. SIMON: Counsel had made a motion to have this court pass upon the admissibility of an excited utterance that was admitted at the preliminary exam and counsel had made a previous – I don't want to reargue that motion but the upshot of it was that the court has determined that it will, sitting as the trier – or as the trial judge, will determine the admissibility of the excited utterance, and rather than do that during the trial after jeopardy has attached, we will do that before the jury is selected. And with that, we'll call Officer Wayne Brown.

MR. SELBURN: Your Honor, response to the comments made by the assistant prosecutor, it is correct, Your Honor, I had made a motion previous asking that the court make a finding that the ruling [7] of the lower court as to the admissibility of the alleged excited utterance was in error and should be struck, and therefore the findings of – the conclusion of that lower court would also be affected. I have not

asked for this evidentiary hearing at this time and, in fact, have – have stated a preference to decide the issue during the trial which is the appropriate time because the testimony may change. And point in fact, the testimony – the testimony upon which the prosecutor relied at the exam was upon a certain officer who is not present and is not expected to be present, and we may be basing the admissibility of this statement today in the testimony of certain officers who may or may not be present when the matter is tried, even though that trial may be later today or tomorrow. We may have different witnesses here, and therefore at this – the ruling today would be based on something that's not going to happen. So I'm asking that the court make its finding during the trial and that is the appropriate time.

MR. SIMON: Well, originally I think the court scheduled this at the request of the defense, and the defense has then said no, that the motion it made was not to have a hearing before the trial but [8] to have this court pass upon the decision that was already made by the district court. Even if that's so, even if the court then would say, fine, if you're not asking for the hearing, we won't hold the hearing, I am nevertheless asking that we hold this before we start the trial because it's a crucial issue to the prosecution's case. And I think the – if this court rules that the excited utterance is not going to be admissible, then we won't have a trial here, and instead, since jeopardy will not have attached, we'll at least have an appellate right to proceed accordingly after

the court makes its rulings, and that's the reason why I'm requesting this hearing before we start.

MR. SELBURN: Judge, I have to respond I did not ask for this hearing when we were in court last. In fact, I – I think I expressly said that I was not asking for it at that time and I'm saying so now. And the fact that jeopardy would attach, Mr. Simon may be correct, but that – be that as it may, he shouldn't be allowed to hedge his bets this way. And we may have different witnesses at the trial. Just like the witnesses are different between the exam and now, they could be different between now and the trial.

[9] MR. SIMON: Well, counsel can protect the defendant's rights. If we have – in other words, he can have his cake and eat it too because during the trial, if the court does find that the testimony is so significantly different on the matter of whether this is an excited utterance, the court can then I suppose make a different decision during the trial. I don't think that's going to happen. But at the very least, as we said in chambers, even if the court decided to do this during the trial, we would have the witness testify during the trial with the jury out so that the jury doesn't hear possibly excludable evidence. So I don't see what the difference between having a jury out while we're doing it or doing it before we pick a jury.

THE COURT: I think it's most appropriate to proceed with the hearing now in the interests of judicial economy. If the court determines that the –

that the statement is not admissible, then we haven't gone through the problems, or not the problems but the issues of picking a jury and everything else, so let's proceed.

MR. SIMON: Thank you, Your Honor.

THE COURT: Would you raise your right hand?

[10] WAYNE BROWN

was thereupon called as a witness herein, and after being first duly sworn to tell the truth and nothing but the truth, testified on his oath as follows:

THE COURT: Please be seated.

DIRECT EXAMINATION BY MR. SIMON

Q Would you tell us your name and occupation for the record please?

A Wayne Brown. I work for the City of Detroit, Detroit police officer.

Q How long have you been a police officer?

A Three years.

Q Officer Brown, were you on duty back on April the 29th of 2001?

A Yes, I was.

Q And on that date, in the early morning hours, between 3:00 and 3:30 a.m., did you go to a Price Gas Station at 10100 Mack in the City of Detroit?

A Yes, I did.

[11] Q And what was the purpose for you going there?

A We was dispatched to 10100 Mack for person shot.

Q And when you got to that gas station, did you see a person who had been shot?

A Yes, I did.

Q All right. Was that person identified to you, either by himself or through other means, as Anthony L. Covington?

A That's correct.

Q All right. Did you – did you have contact with Mr. Covington?

A Yes, I did.

Q All right. Where was Mr. Covington, was he a pedestrian, was he in a vehicle, what was he doing?

A Um, Mr. Covington, he was laying outside of his vehicle.

Q When you say laying –

A He was laying out in the driveway of the 10100 Mack at the Price Gas Station.

Q Was he laying completely outside of the vehicle?

A Yes, he was.

Q All right. And when you say laying, was he laying on the ground?

A Yes, he was.

Q All right. And did you see anything that led you to [12] believe that Mr. Covington had been shot?

A Well, he had – I can't remember the color of his shirt that he had on, I mean the shirt or his jacket, but he had blood like on the front of his body.

Q On the front of his body in the stomach area?

A Yeah, like, you know, on the front of his body, like the side – like up in the front area, the side.

Q All right. And while you're telling us that, you have your hand stretched out with your fingers stretched out from the palm and you're moving it all across your chest and your stomach area. Is that where you saw blood on Mr. Covington?

A Yeah, it's – it was mainly like in the front of his body.

Q All right.

A I can't exactly recall like, you know, if it was from – down from his torso, you know, down.

Q In general, what condition did Mr. Covington appear to you to be in?

A He seemed to be – he was an injured person.

Q All right. Did you speak to Mr. Covington about, first of all, when that injury had occurred, how much prior that injury had occurred?

A Well, I spoke with him and that's the time that he told me that he – he's been shot.

[13] Q All right. And what words did he use, if you recall, when he told you he had been shot?

THE COURT: Let me ask it different. What did you say and what did he say? Who spoke first and what did you say and what did he say?

THE WITNESS: Well, I can remember when we first came up and it was, you know, a few people standing around and I asked– I asked Mr. Covington what happened and he said he had been shot.

Q All right.

THE COURT: And then what?

Q Those are the words you asked and the question, what happened?

A Right.

Q And his words were I've been shot?

A Correct.

Q All right. Did he give any other details after that or did you ask more questions, what happened then?

A Then he proceeded to say that he – he went over a friend's house and, you know, he knocked on the door and he – and he stated who he was, and once he did, he said, um, someone named Rick shot him through the door.

Q All right. He referred to the person he was going to visit as a friend, as a person he knew?

[14] A Right, as a person that he knew, he was going to visit a person that he knew.

Q All right. And he indicated what happened there?

A That he knocked on the door and –

Q Did he indicate which door, front or back or side or what?

A He said the front door he said.

Q When – did he say he talked to the person at the house?

A That's correct.

Q All right. Did he say that he knew who it was he was talking to, did he refer to a name of a person that he was talking to?

A Yes, he did.

Q What name was that?

A Rick.

Q All right. Did he indicate that Rick ever opened the door?

A He never opened the door.

Q All right. Rick shot through the door at him?

A Correct.

Q All right. And what state, if you can tell us, what state did Mr. Covington appear to be in at the time he was telling you this, was he calm, was he not calm, what?

[15] A Well, he wasn't- – he wasn't calm. He was talking, you know, he was talking slow. I mean he wasn't talking like he was just holding a regular conversation with me.

Q Not like he's holding a regular conversation?

A I mean it wasn't like he was just sitting out shooting the breeze.

Q What was he talking like then?

A He appeared to be, you know, like he was in pain, like nervous, you know, in pain, you know, he was – he would say a few words, he would stop and he would start grabbing his – you know, grabbing his side and stuff like that.

Q Did he appear to be in physical pain?

A Yes.

Q And did he indicate to you or did you get any information as to how this had happened either from him or other sources as to not – how or when this had happened in terms of time, how long before he's talking to you had he been shot?

A Within – within maybe 10 minutes.

Q All right. Did he indicate –

THE COURT: Okay. Where did you get that information?

THE WITNESS: Well, because that's what he [16] said, that he – that it occurred around, you know, 3:00 o'clock, you know, 3:00 o'clock, and we – we got the run around 3:20.

Q All right. Did – did he give you a location as to where this had happened?

A Yes, he did.

Q What location was that?

A Well, I would have to look at my – I know it's somewhere Pennsylvania, 41 or –

Q If you could, look at the PCR and see if he gave you the exact location.

A 4203 Pennsylvania.

Q And how far is 4203 Pennsylvania from the place where he was at that time, this Price Gas Station?

A I would say maybe about four blocks, maybe five blocks.

Q All right. Did Mr. Covington indicate to you that after having been shot at this address on Pennsylvania –

THE COURT: You're leading.

Q Okay. Did he indicate to you where he had gone directly after being shot at 4203 Pennsylvania?

A He drove himself to 10100 Mack at the Price Gas Station.

Q Did he indicate – did he ever tell you that he had [17] been anywhere else in the meantime?

A No.

Q All right. And you said this was four blocks?

A I would give it – you got Cadillac, Pennsylvania, maybe three or four blocks.

Q All right. Did – eventually did someone convey Mr. Covington to the hospital?

A Yes, EMS.

Q EMS arrived?

A Yes.

Q How long were you there with Mr. Covington before EMS arrived?

A Maybe five to 10 minutes.

Q During that entire five or 10 minutes, is Mr. Covington talking to you that entire time or just part of that time?

A Just part – I mean off and on. I mean he talked to my partner a little bit, he talked to me a little bit.

Q All right. Did Mr. Covington appear to be in pain just part of the time or all of the time that you were talking to him?

A All of the time.

Q Okay.

MR. SIMON: I have nothing further, Your [18] Honor.

CROSS-EXAMINATION BY MR. SELBURN

Q Officer Brown, how long had you been an officer, Detroit police officer, back on 4-29 of 01?

A Maybe around two, two-and-a-half years.

Q Now, how is it that you learned to go to the location at 10100 Mack, what caused you to go there?

A We were dispatched there.

Q What was the dispatch?

A It was a person that was shot, that was the dispatch run.

Q All right. Who was your partner that day?

A Scott Pellerito.

THE COURT: Scott who?

THE WITNESS: Scott Pellerito.

Q Who was driving?

A Pellerito.

Q Now, when you first arrived at that location, 10100 Mack, what did you see?

A When we first pulled up, we seen a man laying on the ground next to a vehicle.

Q Where was that vehicle?

A It was in the driveway of 10100 Mack at the Price Gas Station.

Q Can you give us anything more specific?

[19] A It was facing – it was facing east.

Q Was it up near the door of the building, was it – is there gas pumps, was it near gas pumps, was it down near the street?

A It was near – would have been near the gas pumps, sir.

Q Near the gas pumps. Was there more than one gas pump, more than one island there?

A It's a small gas station. I think it only had – I mean like you can – I think it had two sets of gas pumps and you can, you know, with the four things there, you could – you could, you know, get gas either side.

Q So there's one island?

A So he was like out closest to the street. Like he wasn't on the inside, he was closer to the street.

Q And the car is facing east?

A Yeah, the car's facing east.

Q All right. Now, is – is this – is this 10100 Mack, is that an east/west, north/south?

A East and west.

Q East and west.

Which side of Mack is it on, the north side or the south side?

A It's on the south side.

[20] Q And where – all right. So the vehicle's facing east on the street side of the pumps, on the south side of Mack.

Now, did you see this individual that we've been referring, to that you've been referring to, when you pulled in?

A Mr. Covington?

Q Yes.

A Yes.

Q Where did you see him?

A He was laying in the driveway of 10100 Mack.

Q Was he away from his car?

A No, the driver door was open and he was laying right beside – side – you know, right beside the car.

Q Okay. Now, would that be the side toward the pump or away from the pump?

A Well, it would be away from – like I said, he was like closest – you know, like closest to the street, so he would – I mean he was like next to the pumps.

Q Okay. So the driver's side of the car, that's closest to the pumps?

A Yeah.

Q Is he lying with his head towards the front of the car or how?

A Really can't recall. I believe – I believe his head [21] was towards – towards the front of the car.

Q Okay. Was he on his back?

A No, he was on his side.

Q Which side?

A The right side.

Q Now, when you pulled in – so the car would have been between him and the street, if he's closest to the pumps, the car would be between him and the street?

A Okay. See, I don't know if I can really, you know, describe this to you .or not, but just if you were approaching into the driveway of the gas station, in that gas station – it might have more pumps but I believe it was two pumps right there, and as you come into the driveway, he was closest – he was out maybe towards the street more than like, say, if you were going into the store. It wasn't at the door of the entrance of the store. It was – it was closer to the street.

Q Okay. But was the car between him and the street?

A No, the car was – the car – here's the pumps, here's the car and here's the street.

Q Is he between the pumps and the car?

A Well, no, he's closer to the street, sir.

Q Okay. So he's closest to the street?

A Right.

[22] Q Could you see him as soon as you pulled in?

A Yes.

Q Nothing blocking your view?

A No.

Q Did – did your car – you're in a marked squad car?

A Yes.

Q Did the squad car pull right up next to him?

A No, we didn't pull up next to him. I believe Scott – I don't know if they used to service cars there or what. They start selling groceries, but I believe it was the air pump like off to the side, off to the side. We didn't pull the car right in.

Q Okay. So you think that your squad car pulled in over near the air pump?

A I believe, I believe, yeah.

Q That's the pump to fill tires with?

A Correct.

Q Were there any other police officers there when you pulled in?

A I can't recall. I don't believe so, no.

Q All right. So when you pulled – when you parked the car, when your partner parked the car, what did you do?

A We got out of the car.

Q What did you do?

[23] A What did I do?

Q Yes.

A I got out of the vehicle and I went towards Mr. Covington.

Q Immediately?

A Yes, I did.

Q You didn't go into the station and asked what had happened or anything like that?

A Negative, no.

Q Now, were there any other people that were outside when you pulled in?

A There were – I believe it was a couple people out there.

Q Were they near Mr. Covington?

A I can't recall but I know it was a few people. I don't know how close they were to Mr. Covington.

Q And how about your partner, Officer Pellerito, did he – what did he do upon parking the car?

A Well, he got out of the vehicle too.

Q Where did he go?

A Towards Mr. Covington.

Q Did you walk together?

A Well, he was – he was farther away. I was there before he got to Mr. Covington.

Q Okay. So when you exited your squad car, you were [24] closer?

A Right.

Q So you got to Mr. Covington sooner?

A Correct.

Q So you were the first officer to get there?

A Correct.

Q Next to Mr. Covington?

A Correct.

Q Was he conscious?

A Yes, he did talk to me.

Q So when you first got there, he was conscious?

A Yes.

Q All right. And the first thing you asked him was what?

A I asked him what happened.

Q And that's when he told you I've been shot?

A Yes.

Q Did you make any inquiry about his physical well-being?

A As far as, you know, how do you feel or are you okay?

Q Anything like that?

A I can't recall.

Q So he told you that he had been shot. Was that before or after you noticed that there was blood on [25] his front?

A Well, I noticed blood when I walked – when I walked up towards him. That's when I asked him what happened.

Q Okay. Was it just a small amount of blood?

A Well, I mean I just – I noticed that it was – I don't know if it was a large amount or small amount. I just noticed that he did have some blood, some blood on him. I can't say hundred percent for sure just how much blood was on him.

Q All right. After he told you that he had been shot, did you ask him anything further along that –

A No, he told me.

Q He told you?

A Right. I asked him what happened and he told me he had been shot.

Q So you did ask him a question, you asked him what happened?

A Right, I asked him what happened.

Q Okay. And that's when he told you, he told you what, he went to a friend's house?

A Yeah, somebody's house over on Pennsylvania, and he knocked on the door and the person on the other side of the door said who is it and he stated his name and then he said somebody fired a shot named Rick.

[26] Q Where did he say he was struck?

A He told me in the back.

Q That means the – referring to the back of his body?

A The back, yeah.

Q The back of his body?

A Correct.

Q But in the front of the home?

A Correct.

Q Now, while he's telling you all that, you're asking him questions as he's going along, aren't you?

A No, he told me what happened.

Q But you did ask him what happened?

A Right, that's what I asked him, I asked him what happened and he told me what happened.

Q And then did you ask him where did this happen?

A I can't recall if I asked him where did it happen. I don't know if he told me that, you know,

that it happened at – on Pennsylvania at the time, I can't say for a hundred percent sure.

Q All right. And he just told you it happened on Pennsylvania?

A Like I say, I can't say a hundred percent sure if he told me, but, you know, during that; somehow that, you know, it did come out because we had to send another scout car over on Pennsylvania.

[27] Q All right. But he just told you it happened on Pennsylvania?

A I really can't recall, sir, if he – if he gave me – if I asked him where did it happen or he told me where it happened.

Q Okay. But he didn't give you the address, he just told you on Pennsylvania Street?

A Right, but I can't be – that's what I'm saying. I don't know if I asked him where it happened or he told me where it happened.

Q But regardless of that, if you asked him or if he told you, he just gave you the street, correct?

A Well, I – that's what I'm saying. I don't know if – I know what you're saying. When I just said Pennsylvania, I don't know if he gave me the address, but at some point he had to give us the address I would have no way of knowing the address on Pennsylvania.

Q Okay. You do not recall him giving you the address though?

A I can't recall – I can't recall him giving me the address, but evidently he had to give me the address. I would have no way of knowing the address.

Q Now, while this – while you're talking to him, [28] where – let me ask you this. Strike that.

Let me ask you something else now. The door to his car is open?

A Yes.

Q All right. So we have the car and we're talking about the front driver door being open?

A Yes.

Q What kind of car was it?

A I would have to look at my PCR.

Q Go right ahead, go right ahead.

A 94 burgundy Chevy Lumina.

Q And is his – is his body kind of right in there, in the angle there where the door and the body of the car come together, is that where he's laying?

A He was real close to the vehicle, yeah.

Q Okay.

A Yeah.

Q Now, are there any pumps immediately next to him there also?

A It was – like I say, it was pumps close by. I believe it was two pumps right at the gas station because it was a really small gas station.

Q So this is a – kind of a –

A Yeah, it's a small gas station.

Q But the area where he's at –

[29] A Right.

Q – is kind of a tight crowded area where he's laying there with the car on one side of him, the door above his head, agreed?

A I mean it was – it wasn't, you know, like I would say, a normal gas station, you know. I mean it was – it was enough room for his car to get there and he's laying there, you know, it was enough room for that.

Q How much room there is there for you to be – how close were you to him when you were talking to him?

A I mean I'm just like – if I was standing here, I mean if I stepped down, I was – that's how close I was.

Q Well, five feet?

A I mean – I mean right on him. I don't know if you want to call it two feet. I mean I was right there, you know, where he was laying at.

Q Well, how far from him?

A How far was I from him?

Q Yes.

THE COURT: Could you touch him?

THE WITNESS: I could touch him.

Q So within arm's reach?

A Right.

[30] Q Which part of him are we talking about that you could touch, up near his head?

A Right, his upper – upper body.

Q Now, is EMS there?

THE COURT: When?

Q When you're talking to him?

A No, they're not there yet.

Q They haven't gotten there yet?

A No.

Q All right. And while you're talking to him, where is Officer Pellerito?

A He's there with me.

Q Where?

A I can't recall what side he was standing on with me but he was right there with me.

Q Are you standing?

A Well, yeah, I'm standing, yeah.

Q Okay. You're not down on your – you're not sitting down next to him?

A No.

Q Are you kneeling down next to him?

A I was bent over, I wasn't sitting.

Q So you were bent over?

A Right.

Q But you weren't kneeling?

[31] A No.

Q And Officer Pellerito was standing?

A Yes. I can't recall if he was bending or standing but I know he was right there where I was.

Q And you don't know which side?

A No.

Q Now, did any other officers arrive?

A I believe shortly my sergeant came.

Q Who would that be?

A At the time, let's see here.

Q You need your PCR for that?

A It was Sergeant Wenturine.

Q You needed your PCR for that?

A No, it's not in here.

Q It's not in your PCR?

A No.

Q Sergeant Wenturine?

A Wenturine, yeah.

Q And how long after you arrived did he arrive?

A I really can't recall.

Q Was he there with you talking to Mr. Covington?

A I really can't – I really can't recall if Mr. Covington was in EMS truck at the time when Sergeant Wenturine showed up or not.

Q Okay. And how long was it after you got there that [32] the EMS showed up?

A It would have been within five to 10 minutes maybe.

Q Now, he didn't tell you he was in pain, did he?

A Well, he said he needed EMS.

Q He said he needed EMS?

A I recall that. He didn't tell me like he's in pain. He said when is EMS coming?

Q Okay. Well, he knew he had been shot?

A Well, evidently he did, yeah.

Q Did you lift up any of his clothing or anything like that to see where the wound was?

A No, I didn't.

Q How about your partner, Pellerito?

A I can't recall if he did.

Q Now, how was his voice as you talked to him, was it strong, weak, loud, soft?

A I don't know how normally he talks, you know, I never – don't know how he talks normally, but it sound that, you know, he was talking like he was in pain to me.

Q He didn't actually say he was in pain?

A I can't recall him saying that, sir, no.

Q Okay. Was his voice – did it sound – was it soft?

A Yeah, it was real low.

Q Real low?

[33] A Yeah.

Q Was it hard to hear him?

A Well, I was bent down next – you know, leaning over him. He wasn't talking loud. I mean I don't know how he talks normally, but he was talking low when I was talking to him.

Q Now, you don't know how long he had been laying there before you arrived, do you?

A I couldn't say, no, I couldn't say.

Q The station was open for business?

A Yes, it was.

Q Okay. Did you ever inquire of anybody there how long he had been there?

A Well –

Q That's a yes or no, Officer, that's a yes or no. Did you ever inquire of anyone how long he had been there?

A Well, I mean this – I can't say yes or no. I mean I know that he said he got shot around 3:00 o'clock, so I guesstimate maybe around 10 minutes maybe that he was laying there.

Q When he told you that he got shot around 3:00 o'clock, was that because you had asked him when did this happen?

A Well, it's possible that I did. It's possible that I [34] asked him or Pellerito asked him, it's possible. I mean one of us had to ask him. I can't recall who

asked but one of us had to ask about what time did this happen.

Q Now, you're familiar with the area of 10100 Mack?

A Yeah, well, pretty much now, yeah.

Q How about then?

A I mean it was fairly – I mean I could know the area fairly well.

Q Was it in the precinct you worked?

A Yes.

Q And were you working in that precinct back then?

A Yes, at the time, yeah.

Q And how about Pennsylvania, Pennsylvania, 4203 Pennsylvania, was that also within the precinct that you're in?

A Yes, it is.

Q Now, if I suggested that – and 10100 Mack, that's at Cadillac and Mack?

A Yes.

Q Okay. If I – and 4203 Pennsylvania is near Laura Street?

A Well, I don't know the exact cross street. I don't know the exact cross street.

Q Are you familiar with Laura Street?

[35] A Well, yes, I seen Laura before.

Q And if I suggested to you that Laura and Pennsylvania was six blocks from Cadillac and Mack, would you dispute that?

A I meaning it's possible. I don't know every side street. I mean it's a lot of side streets. I can't tell you exactly every single side street.

Q Okay.

MR. SELBURN: May I approach, Your Honor?

THE COURT: Sure.

Q Sir, does that appear to be a map of that immediate area?

A Yes.

Q Okay. And would you agree that Cadillac and Mack is one block over and five blocks up to 4203 Pennsylvania?

A Yes.

Q Total of six blocks?

A Yeah, it could be like maybe five, six blocks.

Q Would there be any traffic control devices between those two locations, stop signs, yield signs, stop – traffic lights?

A Yeah, it would be.

Q Was the engine running on that car, the 94 burgundy, and I can't recall what it was, Lumina?

[36] A Yeah, I can't recall if it was running or not.

Q You don't recall?

A No.

MR. SELBURN: Nothing further, Your Honor.

MR. SIMON: No redirect, Your Honor.

THE COURT: Fine. You may step down, Officer.

(Whereupon the witness was excused at 12:20 p.m.)

THE COURT: Any other witnesses?

MR. SIMON: Your Honor, it is my preference not to call any further witnesses on this matter. However, Sergeant Wenturine is here should the defense want to ask him any questions.

THE COURT: Do you want to?

MR. SELBURN: Um, can I have just a second, Judge?

THE COURT: Sure. Got a note that we can't get any jurors until 2:00 but we should have them at 2:00.

(Brief pause)

THE COURT: Do you want the sergeant or not?

MR. SELBURN: No, Judge.

THE COURT: Okay.

[37] MR. SIMON: Sergeant Wenturine, I just want to get a means of getting ahold of him tomorrow –

THE COURT: Okay.

MR. SIMON: – before he leaves.

THE COURT: All right. Arguments?

MR. SIMON: Yes, Your Honor. I suppose on a scale of excited utterances, which are less exciting on the one hand versus more exciting on the other hand, this is off the end of the right hand. This is the – probably the most excited of excited utterances that one could imagine. One's been shot, and, in fact, Mr. Covington, as we know, unlike what the officers knew that night, but what we know now is that Mr. Covington ended up dying of his injuries. He himself, Mr. Covington, may not have known that at the time.

But the very least, I think the cases that talk about excited utterances talk about the entire spectrum of excited utterances I suppose from – say you have a friend who says I'm going to the airport and I'm leaving to California today, and then you see him three hours later that day in the city. That could

be an excited utterance about the fact of having seen him because you're not expecting it.

On the other hand, I think the reason why [38] the courts have set out this – in the court rule, evidence rules have set out this exception to the hearsay rule is because people aren't likely to make something up about something as serious as this, and this is the most serious we can get in terms of excited utterances, from the least excited to most as I've said.

The – the case requirements are – Supreme Court has done away with the absolute requirement that there be a determination of some time passing between the event and the utterance in order to have – have had time to fabricate, in other words. The Supreme Court says no, it's not the time involved, it's whether or not the – it's a question of – one of capacity, whether the declarant appears to have had the capacity to fabricate the excited utterance.

In this case we have the officer testifying that within he said four blocks, but it appears from the map he was shown by the defense maybe six blocks. There's no practical difference between that because the deceased is in his car and it may take him an extra 10 or 20 or 30 seconds to travel that extra two blocks.

But in any case, the circumstances here [39] show that the deceased was shot. He then went immediately to this gas station, which it wouldn't surprise me from the map that was shown to the witness that this is probably the first place of

business that's open in the middle of the night and that he comes across having left the place.

THE COURT: Stick to the facts as we know that. None of that's in front of me.

MR. SIMON: Well, he goes to Mack and Cadillac which is a – in that neighborhood, probably a busy intersection from six blocks away, and the circumstances show us he goes there in order to alert someone that he needs help.

THE COURT: Don't – just stick to the facts, Mr. Simon.

MR. SIMON: Well, Judge –

THE COURT: The circumstances don't show that he did that to alert someone. There's nothing on this record to show that, that he went there to alert someone.

MR. SIMON: I suppose you could say, Judge, that having been shot, you might not care about whether or not you get help or not.

THE COURT: I'm trying to – I'm just trying to shorten your argument.

[40] MR. SIMON: Very well.

THE COURT: I have all the facts.

MR. SIMON: He gets to the gas station, he tells the officer when is EMS going to get here. He is in pain according to the officer. He either says he's in

pain – the officer doesn't remember what – whether he says that or not, but he's acting in pain, and I think the officer, as any human being, would know whether a person is acting in a manner that shows he's in pain. And from the circumstances, this has happened about 10 minutes earlier, and I can't imagine a more excited utterance, a situation which would fit the – the exception to the hearsay more than this one would, and I would ask the court to rule that the – the evidence that the officers will give as to what the defendant said should be admissible.

One further thing, the – it appears from the questions asked by the defense that it may be important to the defense's argument that a question or questions was asked of the deceased before he said what he said. And the court, Supreme Court has said in *People vs. Smith*, 456 Michigan, page 543, that the fact that a statement was in response to a question does not exclude it from being an excited utterance, [41] especially I think in that case it was an open-ended question that was asked, and as here, it was an open-ended question that was asked, what happened? If the question that were asked is did Rick shoot you at 4203 Pennsylvania, then I suppose the decision might be different, but the open-ended question was asked what happened? The deceased said what happened, said where it happened, said how long before it had happened, and under those circumstances, this statement ought to be admissible.

THE COURT: Response?

MR. SELBURN: Well, Judge, I guess if we're going to put this on a scale, I would put it at zero. I didn't hear anything that sounded particularly exciting, and I mean – and I don't mean that in a derogatory way, but there's no indicia of excitement here at all. An excited utterance is somebody running out in the street and screaming at the top of their lungs about something that just happened or somebody jumping up and down in some type of exclamation about what had happened without the opportunity to fabricate or change the facts, distort the facts. And it's not a matter of was that done. It's a matter of is there the opportunity for that to [42] have happened?

Um, the facts that we've heard here is that upon questioning, Mr. Covington, the decedent, stated that it had happened about 3:00 o'clock. Now, the time frame, maybe I got it wrong but I thought the time frame was a little bit longer than 10 minutes. I think it was longer than 10 minutes as to when these officers spoke with him because they didn't know how long he had been there. The initial – the initial information that was received from Mr. Covington was obtained upon questioning by the officer. What happened? I've been shot. This man didn't just blurt it out, he didn't exclaim it, but he responded to a question. And he responded in a soft voice. He did nothing to indicate any excitement.

We have Officer Brown saying that he – well, he looked like he was in pain, but he couldn't articulate any reason for making that – making that – I should say forming that opinion, just that he looked like he was in pain because the man asked for EMS. Well, anyone who's been shot is probably going to ask for EMS, that's logical. It does not lead one to conclude that there's pain. It just leads one to conclude that someone who asked that [43] question is in need of medical attention. He couldn't recall if Mr. Covington ever did say he was in pain. I think that a fair conclusion is that he did not. Otherwise the officer would have noted that.

He said that the man would say a few words and that he would stop and that he would resume speaking. That in itself, Judge, would allow someone the opportunity to fabricate. And I'm not saying that he is or he isn't, but it allows him the opportunity, and I think that's what the case law on this issue directs us to.

I'm going to direct the court's attention to *People v*, and I'll speak it but then I'll spell it, *Creith* I believe, C-r-e-i-t-h, which is at 151 Mich. App. 217; it's a 1986 case. And in this case the court addressed couple of issues, one of them being pain. And I believe it's at page 225 in that opinion where the court said, "We think it would be erroneous to conclude in this case that Yacobelli's physical pain greatly reduced the probability that his statements were contrived." Yacobelli would be the declarant, Your Honor.

So what the court is saying is that even though there was evidence that the declarant was in [44] pain, that should not be an indicia of excitedness, so to speak. That's not an indicia of – or I should say that that does not preclude the opportunity to contrive a statement. Pain does not negate that. The court rule and the requirement of the excitedness is to eliminate or try to eliminate the opportunity to contrive. Pain doesn't do that according to the *Creith* decision.

That court also went into the fact that the statements of the declarant were made upon questioning and that court found that because they were upon questioning and not spontaneous, that that also was indicia of the statement not being excited.

In *People v Edwards* – and I'm trying to get the cite, Judge. It's hard to do with these internet citations. I can give you a NW2d citation, Judge; 522 NW2d, 727. Oh, here it is, 206 Mich. App. 694; it's a 1994 case. And that court ruled that in order to determine the admissibility, there has to be a determination as to whether or not there is time to contrive or misrepresent the interval and that the court should also look to the declarant's emotional state at the time.

Looking at the emotional state of Mr. Covington, he seems to be calm, he's in need of [45] medical attention, he's asking for EMS, when are they going to come, and he's calmly stating to people whatever it

is that he's stating, but he's not doing it in any type of excited fashion.

Judge, I would submit that we do not have an excited utterance here in any shape, manner or form, and I would ask that the court rule that the statement is not admissible.

THE COURT: Brief rebuttal?

MR. SIMON: Just a couple brief things, Your Honor. *People vs. Creith* is a 1986 case. The case I cited to the court, *People vs. Smith*, was 12 years later, 1998. I think it used to be the case that pretty much if a proffered excited utterance were the result of questions being asked, that it was not admitted, but – that may have been the case in 1986 but as of 1998 and now, it's no longer the case. And it really depends on whether or not the circumstances showed that there was a contrivance, and here there was an open-ended question, what happened, and there's no contrivance involved here. And I think the – the evidence the court has heard, unlike what has been characterized by the defense, this was not a calm person who was giving the statements to the police. In fact, the officer [46] testified just the opposite. He said – and I believe his words were something to the effect of no, he wasn't just talking to me as if he was walking down the street. This was something much different. This person had blood on his front and was speaking of what had happened that had caused him to be shot several minutes earlier. As I said earlier,

I cannot imagine any more classic example of an excited utterance than this one.

THE COURT: All right. 803(2) defines an excited utterance as an exception to the hearsay rule, as a statement relating to a startling event or a condition made while the declarant was under the stress or excitement caused by the event or condition.

And as I understand *People vs. Smith*, the factors to be considered include the length of time that passes between the event and the statement, the circumstances of any questioning that may have elicited the statement and whether it appears that the statement was the result of reflective thought.

Here Officer Brown arrived at the location, found the decedent lying outside the vehicle, blood on the front of his chest or stomach, asked him what happened, and in response to that question the [47] defendant or the decedent said that he had been shot and gave other circumstances including identifying someone named Rick as the person who shot him. The officer said he was talking in a low voice, talking slow, appeared to be in pain, appeared to be nervous. He would say a few words, stop, grabbed his side.

He also said it happened at about 3:00 o'clock or at 3:00 o'clock. The officer indicated that they arrived on the scene at about 3:20, some 20 minutes later. This situation, some time had passed, about 20 minutes according to the testimony. The victim had driven some six blocks and the statements were made in response to an open-ended question, what

happened? But they were clearly made while in pain and nervous, short time after being shot.

Court finds the statements were made under the stress and excitement of that startling events and I will admit the statements of the decedent to the officer under 803(2). Okay. Be back here ready to go at 2:00 o'clock.

MR. SIMON: Thank you, Your Honor.

(Court in recess at 12:42 p.m.)

(Whereupon proceedings in the above-entitled matter were adjourned to

* * *

Trial Court Order Granting Motion to Admit Statements

STATE OF MICHIGAN ☐ THIRD JUDICIAL CIRCUIT COURT ☐ RECORDER'S COURT	ORDER DENYING/GRANTING MOTION	CASE NO. 02-5508

THE PEOPLE OF THE
STATE OF MICHIGAN

vs.

Richard Bryant
Defendant

At a Session of Said Court held in The Frank Murphy Hall of Justice at Detroit in Wayne County on SEP – 3 2002

PRESENT: Honorable Brookover
Judge

A Motion for to admit statement (with excited utterance) having been filed; and the People having filed and answer in opposition; and the court having reviewed the briefs and recored in the cause and being fully advised in the premises;

IT IS ORDERED THAT the Motion for same be and is hereby ☐ denied ☒ granted.

/s/ Thomas W. Brookover
Judge

STATE OF MICHIGAN

IN THE 3RD JUDICIAL CIRCUIT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN	)	
vs.	)	File No. 02-5508
RICHARD BRYANT,	)	
Defendant.	)	

JURY TRIAL – VOLUME II

Proceedings had and testimony taken in the above-entitled matter before the Honorable THOMAS BOOKOVER, 3rd Judicial Circuit Court Judge, at Detroit, Michigan, on Wednesday, September 4, 2002.

APPEARANCES:

KENNETH SIMON
Assistant Prosecuting Attorney

Appearing on behalf of the People of the State of Michigan

BRIAN SELBURN
Attorney at law

Appearing on behalf of the Defendant Richard Bryant

Linda M. Cavanagh, CSR-0131, RPR, CM, Official Court Reporter

* * *

[22] THE COURT: Would you raise your right hand. Do you solemnly swear that the testimony you give will be the truth, the whole truth and nothing but the truth?

MR. MCCALLISTER: Yes, sir.

THE COURT: Okay. Please be seated over there.

MICHAEL MCCALLISTER,

called as a witness at 9:41 a.m., testified as follows:

DIRECT EXAMINATION

BY MR. SIMON:

Q Would you tell us your name and occupation for the record, please?

A Michael McCallister, Detroit Police Officer, Fifth Precinct.

Q How long have you been a police officer?

A Approximately six years.

Q Officer McCallister, were you on duty in the early morning hours of April 29, 2001?

A Yes, sir.

Q And back on that date between 3:00 and 3:30 a.m. were you called to a gas station at Mack and Cadillac?

A Yes, sir.

Q And what was the reason for you being called there?

A Person shot.

[23] Q When you got to that gas station at Mack and Cadillac did you see a person who apparently had been shot?

A Yes, sir.

Q Was that person identified to you as Anthony Lee Covington?

A Yes, sir.

Q Did you speak to Mr. Covington when he was there?

A Yes, sir.

Q What condition did Mr. Covington appear to be in when you were speaking to him?

A It appeared he had a stomach wound of a gunshot, saying he was shot. He seemed to be in pain and his speech was broken up.

Q All right. Did you or any other officer while you were there ask Mr. Covington what had happened to him?

A Yes.

Q And what did Mr. Covington say when he was asked by you or another officer what had happened to him?

A When we pulled up he was saying I was shot, Rick shot me.

Q He said Rick Shot me?

A Yes.

Q Did he indicate where that had happened?

A Yes, after, shortly after that.

Q And were you able to determine what location this was from his words to you about where it happened?

[24] A Yes.

Q And what location was that?

A That was gonna be on Pennsylvania and Laura.

Q And is that what he described to you, Pennsylvania and Laura?

A Corner house yes.

Q Corner house. Did he describe the house other than just being the corner house on Pennsylvania and Laura, if you recall?

A I don't recall.

Q. Did you and any other officers end up going to a corner house on Pennsylvania and Laura?

A Yes, I did.

Q. And once you got there what did you see, officer?

A There was one house on the corner, got out of the scout car, checked around the area and I found a wallet.

Q. The wallet that you found there, I'm going to show you a series of three photographs, they're exhibits, People's Exhibits 1, 2 and 3.

First of all, number one, does that show the side of the corner house and also the back yard behind 4203 Pennsylvania?

A Yes, sir.

Q Does that also show a grassy strip between the sidewalk and the street that is Laura Street?

* * *

[29] Q. An hour, okay. Eventually did the officers, did some officers gain entrance to the house or tried to pursuant to the search warrant at the back?

A I'm sorry?

Q. Did some officers eventually gain entrance to the house pursuant to the search warrant that had been obtained?

A Yes, we did.

Q. And what happened when entry was gained, how was it gained?

A Not – actually we were let in by a female there.

Q. All right. Had there been some attempted forcible entry before the female came to the door?

A Yes, but there was no answer.

Q. What kind of attempted force was there, was there something broken as a result?

A I believe one of the homicide officers broke out one of the side windows next to the door.

Q. Had there been some knocking on the door?

A Yes, there was.

Q. Did anybody respond as a result of that knocking on the door?

A No. No.

Q. Were you able to obtain any other information from Anthony Covington at the gas station other than Rick shot me at the corner of Pennsylvania and Laura?

[30] A. I believe we got the description of him. It was – Description of Rick?

A Of Rick.

Q Other than that any other information you were able to obtain, that is, what conversation there might have been between Rick and Anthony Covington before the shot was fired?

A I don't recall him telling me a conversation.

MR. SIMON: Okay. I have nothing further your Honor.

CROSS-EXAMINATION

BY MR. SELBURN:

Q Officer, what time did you get the call directing you to go to the gas station?

A I believe it was approximately 3:20 or 3:25.

Q All right. It's between those two times?

A I'd say it was probably closer to 3:25.

Q Who's your partner then?

A Officer Stuglin.

Q Who was driving?

A I believe I was.

Q Now, you get the call at 3:25. How long did it take you to get to that gas station?

A Probably within a couple minutes.

Q And when you get there are you the first officers there?

[31] A I believe there was another unit there, if I'm not mistaken, or we could have got there at the same time.

Q Do you know who was in that unit?

A There was, there was Officer Pellerito and Officer Wayne Brown.

Q Now, when you pulled into the gas station what did you see?

A We got out of the vehicle. We seen Anthony Covington. He was on the ground next to his vehicle, next to the gas pumps.

Q. And where, where was the vehicle?

A It's gonna be next to the gas pumps. It would probably be the last set of the gas pumps next to the gas station front door.

Q Okay. Is he closer to the pumps or is he closer to the building itself, and I mean –

A Pumps.

Q He's closer to the pumps?

A Yes.

Q The car is closer to the building?

A Yes.

Q Okay, And he's laying on the ground?

A Yes.

Q And where is he laying?

A Towards, towards the front of the vehicle between, I'd [32] say between the gas pumps and the front of the vehicle.

Q Okay. Is the door of the car opened or closed?

A I don't recall it being open.

Q That being the driver's door?

A I don't recall it being open.

Q And is he lying parallel with the car?

A I'm not sure exactly how he was laying. It wasn't my concern.

Q Where are his feet? Where is his head?

A At this point I don't remember.

Q Were you the first officer to get over there to him?

A I don't believe so.

Q Who got over there first?

A It could have been the other units.

Q So the other units, when you say the other units you mean Officers Pellerito and Brown?

A Right. And we had a supervisor there with us.

Q You had a supervisor with you?

A Yes. I don't recall what time.

Q Who was that?

A Sergeant Wenturine.

Q Was he there also?

A Yes, he showed up there also.

Q Before you?

A I don't think he showed up before me, no.

[33] Q So you get there and there's already two officers over near this man laying on the ground and so you go over there also, correct?

A Correct.

Q And how about your partner, Officer Stuglin?

A I'm not aware of where his, where he went. He could have been right beside me.

Q Did you think that Officers Brown and Pellerito, did you think they needed assistance over there?

A Yes.

Q What did you think they needed assistance with?

A Well, whenever we get a shooting for our safety we always back units up and then one unit stays or one unit goes to the hospital, just certain things we do.

Q You didn't, you didn't look around and say, gee, there might be a shooter around here, I better keep an eye open?

A I did not, no. That could have been my partner I don't know.

Q You thought these officers needed to talk to this man that was laying on the pavement?

A Sure. I mean –

Q All right. So when you get there is he already being questioned by Pellerito or Brown?

A I believe so.

[34] Q And then you jump in and you start asking questions as well?

A Yes, I did.

Q And this man's in pain?

A Looked to be in pain, yes.

Q What made you think he was in pain?

A I don't know. He was holding his mid section, appeared to be shot and I figure that'll put you in pain.

Q How does one appear to be shot?

A He said he was shot and he was holding his stomach area and his speech was broken up, hard to breathe.

Q Okay. So you got at man who's laying there in pain and he's having difficulty breathing and you got two officers that are asking him questions and you decide that you need to jump in, also ask questions, right?

A I'm not sure if they were asking. At that time I had asked them though.

Q You didn't ask them if they had already obtained the information you were seeking?

A No, I did not.

Q Wouldn't that have been a lot easier on the man who was laying on the pavement?

A Could have been, yes.

Q Did you ask him how he was doing?

A No.

[35] Q Now, did he give you that address, 4203 Pennsylvania?

A No, he did not.

Q So while you're talking to him he tells you that someone named Rick had shot him, correct?

A Correct, several times.

Q Okay. And you obtained from this man a description of Rick, correct?

A Correct.

Q What was that description?

A It's gonna be a black male. If I'm not mistaken on my PCR it's gonna be black male, 40, five seven, I believe it was approximately 140 pounds.

Q Okay. You mentioned a PCR. The PCR is a report that you prepare shortly after something happens?

A Yes, we do.

Q When you're involved in something, some event?

A Yes.

Q Okay. And the purpose of a PCR is to record important information?

A Yes.

Q And that's so that you can recall it in the future?

A Yes.

Q It also assists in the investigation?

A Yes.

Q It's something that's turned over to the officer in [36] charge of the case?

A Yes, it is.

Q So a description of the man who would have shot somebody, that's pretty important, isn't it?

A Yes.

Q Now you knew a first name of Rick?

A Correct.

Q Rick's pretty common name, isn't it?

A Sure.

Q Okay. Did you ask this man for a last name?

A I don't recall.

Q Wouldn't that be the normal thing to ask if you're looking for identification of somebody?

A We may have, and he may have said that that's all he knows him by.

Q Okay. And did you ask him if he knew the man who had shot him?

A Well, apparently he did know him because he said it was a man named Rick so I. assumed he knew him.

Q You assumed he knew him?

A Yes.

Q Well, wouldn't the natural thing to do would be to ask what's Rick's last name?

A That may have but out here everybody knows people by nicknames and first names.

[37] Q Did EMS come?

A They were ordered, yes.

Q Did they come?

A I believe I left before they came.

Q You left before they came?

A I believe so.

Q Did you leave with your partner, Officer Stuglin?

A Yes.

Q Where did you go to?

A Down Pennsylvania northbound from the Price Gas Station to Laura Street.

Q Okay. The most direct way to get from Mack and Cadillac that's where the gas station is, correct?

A Correct.

Q Mack and Cadillac, the most direct way to get to Laura and Pennsylvania is to go one block down Mack and then five blocks down Pennsylvania, correct?

A Could be five blocks, sure.

Q Right down Pennsylvania that's the most direct route?

A Northbound, yes.

Q It's a two-way street at that point?

A It was two-way, one way, I believe it's gonna be. It could be a two-way.

Q It's other portions of Pennsylvania that's one way?

A Yes, there is.

[45] Q Okay. And when you got there Officers Brown and Pellerito were there and they were near Mr. Covington. Were they standing above him or were they kneeling down?

A I just recall them being next to him.

Q And when Mr. Covington would speak was his voice loud or soft?

A Fairly, wasn't real loud but it wasn't soft.

Q Now, sir, you testified before, didn't you?

A Correct.

Q That was September of this year?

A I believe so.

Q Early September?

A Yes.

Q About two and a half months ago?

A Yes.

Q Have you had an opportunity to review a transcript of your testimony?

A Yes.

Q When did you review that?

A Yesterday.

Q You think you need it again if I ask you some questions about that?

A Sure.

Q All right. Officer, referring to page 42, lines five through seven –

[46] A Okay.

Q – do you recall me asking you how long were you there at the gas station and your answer was I would have to estimate two to three minutes possibly?

A Okay, yes.

Q You were sworn to tell the truth in September, weren't you?

A Yes.

Q And you were telling the truth?

A Yes.

Q Now same page near the top, lines one through four. Well, let's go back to 41, if you want to read, it'll read a little more completely. Lines 24, 25 and then the first four lines on page 42, you read that.

A Okay.

Q Do you recall me asking you: "Did he tell you where at the house?" And your answer was: "No, he just told me the house." Then I asked you: "Just told you the house, didn't tell you any of the circumstances as to what happened?" And your answer was: "No, No. We left the scene as soon as I asked him where it was."

A Okay.

Q Nothing there about him telling you his name, is there?

A Whose name, Rick?

Q No?

[47] A Anthony's.

Q Anthony Covington.

A No.

Q Page 42, officer, lines eight through eighteen. You know what, let's just skip through that. Let's go down to line 19 through 22.

A Okay.

Q Do you recall me asking you: "So during the time you were at the gas station Sergeant Wenturine was not at the gas station?" Your answer was: "No, I don't believe so."

A Right, I don't believe so.

Q That was your answer then?

A Correct.

Q He didn't tell you, that is, Anthony Covington, he didn't tell you which door he had been shot at?

A He did not tell me, no.

Q You didn't hear him tell anybody else either, did you?

A I did not hear, no.

Q Officer, turn to page 36, please, lines 15 through 18?

A Okay.

Q Do you recall me asking you the question: "Are they standing over him?" And your answer was: "Next to him. I believe one was kneeling down. I believe it was going to be Wayne Brown that was kneeling down next to him [48] getting information."

A Okay.

Q Did Mr. Covington give you any indication as to how long before you arrived it had been that he was shot?

A I believe he said it just happened.

Q Did you ask him to elaborate on that at all?

A No, I didn't.

Q Did anyone else ask him?

A I have no idea.

Q Were you listening as other officers were asking him questions?

A I don't believe anyone was asking him when I was there, no.

Q All right. Officer, page 18, lines two through four. I'm sorry, question goes back on lines, page 17 last two lines.

A Okay.

Q Do you recall me asking you: "Do you remember when he said Rick shot me did he say those words Rick shot me once or more than once, if you recall?"

In fact, I didn't ask that question, Mr. Simon asked that question.

And your answer was: "I recall one time. Then after I heard he shot me then he told me the address or the location I left the scene."

[49] A Yes.

Q Okay, You didn't say there that he had told you his name, did you?

A Anthony Covington's name?

Q Yes.

A No.

Q Did EMS come?

A You already asked that.

Q Did they?

A Yes.

Q They came?

A Yes.

Q Did you see them?

A I don't believe I was there when they came.

Q Now at some point did you receive additional information as to who you were looking for?

A Yes, we did.

Q And you recorded that on your PCR?

A Yes.

Q Do you recall who that was?

A Yes.

Q Do you need this to refer to it as to a description?

A I have a full name.

Q You have a full name. Do you have this description or do you need this?

[50] A Yeah, I'll need that. His name is Richard Bryant and date of birth is cut off but it was 6-12, and apparently seventy something, driver's license number.

Q Get his physical description?

A Yeah. Black male, thirty, five ten, 180, of 4203 Pennsylvania, driver's license number bravo 653 733 680 440.

Q You recorded a height of five ten?

A Yes.

Q And a weight of 180 pounds?

A Yes, I believe that was taken from the driver's license.

Q And an age of 30?

A Yes.

Q And the man who had been described to you by Mr. Covington was 40?

A Correct.

Q Five foot seven, correct?

A Yes.

Q And 140 pounds?

A Yes.

Q Now, sir, how many times does Mr. Covington say he was shot?

A I believe he said several times.

MR. SIMON: Your Honor, I'm not sure whether that question means did Mr. Covington say it [51] several times or did he say he was shot more than once?

THE COURT: Clarify.

MR. SIMON: I'm going to need some clarification on that.

Q. (By Mr. Selburn, continuing) How many times did he speak the words I was shot?

A When I asked him he told me he was shot, that was one time.

Q One time?

A Yes.

Q And how many shots did he say he received?

A I don't recall him saying how many shots.

Q Sir, I'm gonna show you what's been marked as Proposed Defendant's Exhibit A and B, do you recognize those?

A Look to be the front of 4203 Pennsylvania.

Q Okay. That's the front of the house?

A Yes.

Q Okay, Now on Exhibit B I'm gonna direct your attention to the window that's at the far right of the photo.

A Okay.

Q Do you see two holes in that window?

A Yes.

Q Those look to be like bullet holes?

A Yes, they could be.

Q You're familiar with bullet holes in a window look like,

* * *

STATE OF MICHIGAN

IN THE 3RD JUDICIAL CIRCUIT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN	)	
vs.	)	File No. 02-5508
RICHARD BRYANT, Defendant.	)	

JURY TRIAL – VOLUME III

Proceedings had and testimony taken in the above-entitled matter before the Honorable THOMAS BROOKOVER, 3rd Judicial Circuit Court Judge, at Detroit, Michigan, on Thursday, September 5, 2002.

APPEARANCES:

KENNETH SIMON
Assistant Prosecuting Attorney

Appearing on behalf of the People of the State of Michigan

BRIAN SELBURN
Attorney at law

Appearing on behalf of the Defendant Richard Bryant

Linda M. Cavanagh, CSR-0131, RPR, CM,
Official Court Reporter

* * *

[153] reporter.

MR. WENTURINE: Jeffrey Wenturine.

THE COURT: Do you solemnly swear that the testimony you're about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: Okay. Please be seated.

Tell the jury your name and what you do.

THE WITNESS: My name is Jeffrey Wenturine. I'm a police sergeant with the City of Detroit at the Fifth Precinct.

JEFFERY WENTURINE,

called as a witness at 2:56 p.m., testified as follows:

DIRECT EXAMINATION

BY MR. SIMON:

Q Is that Sergeant Wenturine?

A Yes, it is.

Q Notice with the three stripes on your arm there.

How long have you been a police officer?

A Over sixteen years.

Q Sergeant Wenturine, are you assigned to the precinct that encompasses the 4200 block of Pennsylvania in the city of Detroit?

A Yes.

Q And which precinct is that?

[154] A Number five.

Q Sergeant Wenturine were you on duty in the early morning hours of April the 29th of 2001?

A Yes, I was.

Q And between 3:00 and 3:30 a.m., that early morning, were you called to the Price Gas Station within that precinct?

A Yes. Actually police run came out for scout five six to respond to it, and I followed up also in response to the same police run.

Q And as a sergeant are you like the shift supervisor or a shift supervisor?

A Yes, I am.

Q You said another car responded first but you also went there, correct?

A Correct.

Q When you got there there were already other police officers there?

A Yes, there was.

Q How many other police officers were there?

A At that time only two.

Q Okay. And did others arrive later?

A Yes.

Q Two other officers or more or less?

A Two other officers, one scout car.

Q So five officers all together came to that gas station?

[155] A Including myself it would be five, yes.

Q Okay. Did you that early morning at that gas station come into contact with a person who either identified himself or who you later identified as Anthony Covington?

A Yes.

Q All right. And where exactly was Anthony Covington at the gas station?

A He was on the ground. It would be between the first set of pumps and the front door of the business lying next to a vehicle.

Q Lying next to a vehicle?

A Yes.

Q Was he lying next to the driver's side or next to the passenger's side or which?

A It would be the driver's side, closer to the front of the vehicle.

Q Had you determined that he'd arrived there in that vehicle?

A Yes.

Q Okay. Now, when you first saw Mr. Covington what condition was he in?

A He was in a lot of pain.

Q How could you tell that?

A His facial expressions, his moaning.

Q He was in a lot of pain?

[156] A He was winded.

Q Winded?

A Yes.

Q Did Mr. Covington – did anyone ask him as to what had happened that caused him to be in that condition?

A Yes, he stated he was shot.

Q All right. Did you ask him that or did another officer do that?

A I had asked him that. I'm sure other officers asked him questions also but –

Q When you asked Mr. Covington – did you ask him what happened?

A Yes, I did.

Q What did Mr. Covington say when you asked him what happened?

A He said Rick shot him through a door.

Q Rick shot him through a door?

A Yes.

Q Did he indicate where it was, what location that was that Rick had shot him through a door?

A He said it was the corner house, it was a yellow house on the corner of Laura and Pennsylvania.

Q Okay. And are you aware of where that is?

A Yes, I am.

Q Were you aware of it at the time that he was saying it?

[157] A No.

Q Did you go and find a, you or other officers go and find a house on the corner of Laura and Pennsylvania, a yellow house?

A Yes, I did.

Q And how far was that, if you recall, from the gas station where you first contacted Anthony Covington?

A It wasn't far, but I don't know exactly how far.

Q Less than half a mile?

A Yes.

Q Okay. The, was Anthony Covington able to say anything else that you know of besides Rick shot me through a door at the corner of Pennsylvania and Laura, a yellow house?

A He gave me a description of the perpetrator.

Q Okay. And what kind of description did he give you, if you recall?

A Gave me a description, he said it was Rick, black male, approximately forty years old, five seven, around 140 pounds and light complected.

Q All right. And other than that was he able to say anything else to you?

A Yes, he was able to but EMS was arriving and they started working on him and so forth.

Q Were you able to talk to him after EMS arrived?

A No. Actually I left that scene and went over to the [158] Pennsylvania address.

Q Okay. When you got to the Pennsylvania address what did you see there, sergeant?

A I think the rear of the location there was blood on the porch, a bullet, glasses. There was a wallet on the premises.

Q All right. I'm going to show you what was marked at the previous trial as Exhibits 1 through 11. I'm going to ask you just briefly to go through and look at all eleven of these photographs just to satisfy yourself in your mind just briefly as to whether you'd ever seen these before and if you can identify them, okay.

A Did you want me to explain each one also?

Q No. You can just go through them real briefly just to satisfy yourself right now without answering any questions right now as to what they are, whether you recognize them. Okay.

Sergeant Wenturine, those eleven photographs, are those all photographs of various parts or various locations of the scene at 4203 Pennsylvania?

A Yes, they are,

Q Okay. Are those eleven photographs, do they fairly and accurately represent the scene at 4203 Pennsylvania in the early morning hours of April the 29th of 2001?

A Yes, they do.

* * *

[168] actually handling the outside perimeter security so.

Q Do you recall whether they got in as a result of someone answering the door or through force?

A It was through force.

MR. SELBURN: Objection, your Honor, foundation.

Q (By Mr. Simon, continuing) Did you see someone enter by through the use of force among the police officers there?

A I don't recall.

Q Okay. Do you recall someone coming to the door and letting them in though?

A That did not happen

MR. SIMON: I have nothing further at this time:

CROSS-EXAMINATION

BY MR. SELBURN:

Q Sergeant, what time did you get the call to go to the gas station on Mack?

A I would have to refer to my report.

Q Do you have it in front of you there?

A Yes, I do.

Q Go right ahead.

A 3:15, 3:25 a.m.

Q Which is it?

A 3:25 a.m.

[169] Q That's when you got the call?

A That's what I said.

Q And what time did you arrive at the station?

A Within a couple minutes.

Q Now, you said that there were two other officers there when you arrived?

A Yes.

Q And you said that they had been there for about a minute or so. How do you know they had been there for about a minute or so?

A They announced their arrival.

Q Announced it?

A They announced their arrival and I showed up within about a minute after they announced.

Q What's that mean?

A They announced it over the radio that they were pulling up to the location at Cadillac and Mack.

Q Now you were alone?

A That's correct.

Q And the two officers that were already there were who?

A Officers Stuglin and McCallister.

Q And where were they when you arrived?

A They were by Mr. Covington.

Q Okay. Now, Mr. Covington you said was on the ground?

A Yes.

[170] Q And he was between the first set of pumps and the building, the store?

A Correct.

Q Okay. Was he near a car?

A Yes, he was.

Q Did you later learn whether or not that was his car?

A No, I did not.

Q And what was his position in relation to that car, was he laying along side of it?

A He was laying along side of the driver's side closer to the front of the vehicle.

Q Was the driver's door open?

A Yes, it was.

Q Okay. Was he underneath the door?

A No.

Q Was he in front of the door?

A Yes.

Q And where was his head? Where was were his feet in relation to the front of the car?

A I don't recall. His body was positioned between the front door and the front of the vehicle.

Q The front bumper?

A Correct.

Q Side wise, right alongside the car?

A Yeah. But I don't know if he was parallel or not. I [171] just know the position of his body in that location.

Q All right. And both of the other officers were there near him when you got there?

A They were in the area around Mr. Covington, yes.

Q How close are they?

A I don't know. They were, one of the officers went inside the store. They were looking around were trying to assess the situation so I couldn't tell you what they were doing.

Q So they were not standing there talking to Mr. Covington?

A I did observe them talking to Mr. Covington.

Q Well, you said one was inside the store?

A No. You're talking about a period of three, approximately three minutes.

THE COURT: Let each other finish your questions and finish your answers.

THE WITNESS: It was approximately three minutes long and they were doing a job. At some point they were talking to Mr. Covington. At some point they were in the store. At some point they were talking to other officers at the scene. At some point they were talking to EMS driver. They were doing their jobs.

Q (By Mr. Selburn, continuing) But when you got there what were they doing?

A They were by Mr. Covington.

[172] Q Were they talking to him?

A At some point yes. I don't know exactly whether – were they talking to him when I just pulled up? I don't know.

Q And when you pulled up you got out of your car, of course?

A That's correct.

Q And you went straight to Mr. Covington or did you do something else?

A I went straight to Mr. Covington.

Q And as you did that were the other two officers still there?

A They might have been, I don't know.

Q When I say there, I mean next to Mr. Covington?

A They might have been, I don't know.

Q Did you ask, did you stop to discuss with either of those officers to find out what they had learned?

A Absolutely not

Q So you went straight to Mr. Covington. Did you start to talk to him?

A Yes, I did.

Q And the first thing you asked him was how he was doing, right?

A No, I didn't ask him how he was doing. I already knew how he was doing.

Q You did?

[173] A Yes.

Q How did you know that?

A It was very obvious how he was doing. He was in a lot of pain. He was shot.

Q How did you know he was shot?

A He told me he was shot.

Q Well, you didn't know that before you asked him?

A That's correct.

Q But you knew what had happened to him before you asked him?

A We had a police run on a man shot. I see a guy on the ground in a lot of pain I don't think he tripped and fell.

Q Did you call EMS?

A No, I did not.

Q Now what made you think he was in pain?

A His facial expressions.

Q Which were what?

A The sounds of his voice.

Q What were his facial expressions?

A Pain, moaning, winded.

Q What does winded mean?

A When you're trying to talk and you're having a difficult time to talk because of the pain.

Q Difficulty breathing?

[174] A No, I didn't say difficulty breathing I said winded. You have to stop, as you're explaining a certain situation as he was explaining to me on who did it there were pauses.

Q To catch his breath?

A No, because of the pain.

Q So it would be fairer to say he was having trouble talking?

A Absolutely.

Q Was his voice loud or soft?

A It was medium. It wasn't loud. It wasn't soft.

Q So if the other officers had already asked Mr. Covington what had happened and you knew he was having trouble talking why did you ask him what had happened?

A I don't recall telling you that I already knew the officers, the officer had got the information from him for one. But for another to go beyond that, I will find out for myself. I am the supervisor on the shift. I have a man here that I believe is dying I'm gonna find out who did this, period.

Q If your other officer, if your officers – you're in charge, right?

A Yes.

Q And the officers under your command have already obtained the information that you're seeking wouldn't it be faster to get it from them?

[175] A Once again, who said that my officers already had that information?

Q But you didn't bother to ask them?

A Absolutely not. I told you I went directly to Mr. Covington.

Q So as far as you know you're the first person to talk to him?

A Well, I would actually hope not seeing that the officers were already there. I would hope that they would have already talked to him to get some information about what was happening.

Q But as far as you know you were the first one to talk to him?

A As far as I know.

Q And you asked him was that the words that you used, what happened?

A I don't know the exact words but I talked to him, I found out who shot him and where and I went to that address.

Q Okay. When you say where, you're referring to the location of the shooting?

A That's correct.

Q Not the location on his person, where on his body he had been shot?

A I might have even asked him that, I'm not sure.

[176] Q Okay. You asked him a series of questions though?

A Yes.

Q What happened probably the first question?

A I don't know what the first question was.

Q He told you he'd been shot?

A Yes.

Q That was the first information you learned?

A I don't know if it's the first information. I can tell you what I learned. I don't know the order it was learned in.

Q Okay. You think he told you where it happened first?

A I just told you I don't know the order on the information given.

Q So he tells you that Rick shot him?

A Yes, he did.

Q Did you ask him how do you know it's Rick?

A Yes, I did.

Q What did he tell you?

A He told me he could recognize his voice through the door.

Q Did he tell you what Rick said?

A He said they were having a conversation.

Q Did he tell you what Rick said?

A He did not.

Q Did you ask him for Rick's last name?

A Yes, I did.

[177] Q Did he give it to you?

A He didn't know it.

Q He didn't know it. That certainly would have been helpful, agreed?

A Not necessarily. I mean, it depends on if we make a scene and a guy named Rick is there. If there's not then, yes, it would be helpful.

Q But you did ask him for that information?

A Yes, I did.

Q Okay. And you also asked him for a description?

A Yes, I did.

Q And he told you that Rick was a black male?

A Yes.

Q And he was about forty years old?

A That's correct.

Q And he was five foot seven?

A Yes.

Q 140 to 150 pounds?

A That's correct.

Q And he had a light complexion?

A Yes.

Q Where was Mr. Covington shot? And I mean by that where on his person, on his body?

A Just below his chest.

Q Did you see that wound?

[178] A No, I did not.

Q Okay. How did you determine that?

A Well, he told me. He showed me with his hand, his gesture.

Q How long did you talk to Mr. Covington?

A Within the time I was there so couple minutes.

Q Okay. I'm not sure if I understand your answer.

When you say within the time you were there, you mean the entire time you were there you spent that entire time talking with Mr. Covington, is that what you're saying?

A The majority of the time there I did, yes.

Q And how long were you there?

A A few minutes.

Q What's a few?

A Three.

Q Three minutes?

A Roughly.

Q Did you leave before EMS arrived?

A No, I did not.

Q Now once EMS arrives they kind of take over, don't they, in terms of attending to someone who's injured?

A That's correct.

Q And that kind of precludes you from being able to further question him, doesn't it?

[179] A Does not.

Q It does not. Did you continue to question him while EMS was attending to him?

A No. I did not.

Q Did they do anything to him that would have prevented him from continuing to talk?

A Like I said, after EMS arrived there that's when I took five eight with myself, went over to Pennsylvania.

Q You were still there when EMS arrived?

A Yes, I was.

Q Did you leave immediately on their arrival?

A Not immediately, no.

Q So you saw them starting to attend to him?

A That's correct.

Q Did they do anything that would have prevented him from further talking?

A I don't know.

Q Such as doing something with his mouth or his throat or anything like that? You don't know?

A I don't know.

Q Now you left you say with five eight?

A Yes.

Q Okay. What is five eight?

A It's a scout car.

Q Do you know who's in that scout car?

[180] A Officer Stuglin and Officer McCallister.

Q Okay. And those are the same two that were there when you arrived?

A Yes.

Q Had other officers arrived at the gas station?

A Yes.

Q You weren't familiar with Laura and Pennsylvania?

A Yes, I was.

Q Oh, you were?

A Yes.

Q You went directly there?

A Yes.

Q Do you know how far that is from the gas station to that location?

A Within a half mile.

Q Can you do any better than that?

A No.

Q When you got there were there any lights on?

A I don't recall any lights being on, no.

Q Were there street lights?

A Are you talking about on the house?

Q On the house. In the house.

A Yes, I don't recall any lights in the house.

Q Okay. How about in the house, on the house and in the house, when I say on the house I mean on the exterior

* * *

[192] Q Do you recall me asking you: "Did you remain there after EMS arrived?" Your answer was: "A short period of time. I was there for ten minutes approximately total and then I went over on Pennsylvania."

A Once again, it says I was there for a short period of time after EMS arrived just like I stated about ten minutes ago or so, and I was there for a total of ten minutes. I told you I was there for ten

minutes so you can lay it out however you want. So you can calculate it however you want.

Q When you were talking to Mr. Covington he told you he was shot through a door?

A He said Rick shot him through a door on Pennsylvania, yes.

Q He never indicated that he could see who it was that shot him, correct?

A He knew by his voice.

Q He never saw that person, correct?

A That's correct.

Q And he did not tell you which door, or did he?

A I don't recall that, no.

Q Officer, I'm gonna show you the photographs, People's Exhibits 1 through 11, and I'm gonna draw your attention specifically to the rear door where you saw two bullet holes. I'm gonna ask you if you could point out the two [193] bullet holes for me in any of those photographs?

A I'm not going to be able to point out two bullet holes.

Q You're not?

A No. I didn't take these pictures.

Q These pictures show the door?

A Doesn't show the full door.

Q How about Number 8, that show the full door?

A Number 8 you can't even say, you can't even say, okay, there is a bullet hole. You can see where the wood's peeled away, whatnot when you get the close-up shot then you can observe, yes, that's a bullet hole.

Q The bullet hole?

A Yeah; the one that had hit Mr. Covington.

Q Well, you don't know that, do you? You weren't there to see that?

A Doesn't take a brain whiz to figure that out.

Q You weren't there to see that?

A Like I said, it doesn't take a brain whiz to figure that out.

Q Okay. Officer, I want to show you, sergeant, I'm sorry, I want to show you two more photographs. Those appear to be additional?

A I don't know what this is.

Q You don't know what those are?

A No. You have to show me. I don't know what this is.

[194] Q Maybe these will help.

A And this?

Q Which is this?

A I don't know. What is this a picture of?

Q You've never seen this picture before?

A No, I haven't.

Q Okay. How about – and that's you're referring to what's been marked as Defendant's Exhibit A?

A Yes.

Q Okay. How about B, have you ever seen B?

A Never seen B.

Q You secured the front of the house, right?

A Yes.

Q How about these pictures here that don't have any evidence tags on them at all, do you recognize what's in those photographs?

A Do I recognize what's in the photographs?

Q Yeah. What's depicted in those photographs?

A It's the front of the location.

Q Front of 4203 Pennsylvania?

A Correct.

Q Okay. And you can't recognize Defendant's Exhibit B as being a close-up of the front of that house?

A No, because I never seen that part of the house. My vehicle was parked right over here with my light aimed at

* * *

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT –
(WAYNE COUNTY)

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

vs.

Circuit Court Case
No. 02-5508

RICHARD BRYANT,

Defendant. /

JURY TRIAL,

Before the HONORABLE THOMAS W. BROOKOVER, Circuit Judge, Detroit, Michigan – Tuesday, November 26, 2002.

APPEARANCES:

For the People: KENNETH E. SIMON, P32004
Assistant Prosecuting Attorney
1441 St. Antoine, 12th Floor
Detroit, Michigan 48226-2302
(313) 224-5777

For the Defendant: BRIAN E. SELBURN, P29749
23205 Gratiot, Suite 130
Eastpointe, Michigan 48021
(586) 871-9000

Reported by: Lauren P. Cobb, RPR-CSR-3485
Certified Shorthand Reporter

* * *

[75] DIRECT EXAMINATION

BY MR. SIMON:

Q Officer Stuglin, how long in total have you been a police officer?

A It's going on four and a half years now.

Q And back in the year 2001 were you a Detroit Police Officer?

A That's correct.

Q And you're now with the Shelby Township Police?

A Yes.

Q Back on April the 29th of 2001 were you on duty with the Detroit Police in the early morning hours of that day?

A Yes, I was.

Q Between 3:00 and 3:30 a.m. on April the 29, 2001 did you end up going to a gas station on Mack and, Mack and Cadillac?

A Yes, I did.

Q And what was the reason for your going there?

A Responding to a radio run of a shooting.

Q Did you have a partner with you that day?

A Yes, I did.

Q And who was that?

A Officer McCallister.

Q And when you got there did you find that a person had been shot?

[76] A Yes, I did.

Q Was that person identified to you as Anthony Covington?

A Yes.

Q Did you speak to Mr. Covington?

A Yes, I did.

Q What condition physically and also what condition just from the way he was speaking if he was, what condition did he appear to be in?

A He was speaking in a panicky, scared, I'd say early shock type tone, very repetitive.

Q Where was Mr. Covington when you made contact with him?

A He was laying just outside of the local, in front of the yoke, in front of the gas station.

Laying on the pavement or something?

A On the ground yes.

Q When you spoke to Mr. Covington did you ask him what happened to him?

A Yes.

Q What did Mr. Covington say about that?

A He said he had been shot.

Q Did he say who shot him?

A Yes, he did.

Q What did he say about that?

A He said a guy named Rick, also calls him Buster.

Q Rick or "Buster"?

[77] A Yes.

Q And did he say where that had taken place?

A He said it had taken place down the street, Pennsylvania, on the corner.

Q Okay. Did he describe it further, being that –

A Yes. He said it was on the corner. He said it was on Pennsylvania, corner of, across street. He didn't know the exact name of the cross street but he said it was right on the corner and described the house to me in pretty good detail.

Q All right. Did he say anything else about how he'd been shot and what led up to him being shot, give any details about that?

A He said he'd went up, he went up to the back door of a house; that a person he said he knew, and he was knocking and he was knocking on the door he

said he'd talked to somebody through the door. He said he recognized the voice.

Q Did he say who it was that he recognized the voice of?

A That's what he told me it was, he said it was Rick a/k/a Buster.

Q And did he say what the conversation was about at the door?

A I don't, I don't believe so.

Q All right. And did he say what happened there, whether [78] or not they had a conversation or not, did he say what ended up happening?

A He said what happened was that he heard a shot and then he started to turn to get off the porch and then another one and then that's when he was hit by a gunshot –

Q All right.

A – bullet.

Q You said he was, when you found him at the gas station it's on the ground next to a car; is that correct?

A Yes.

Q Was that his car?

A I believe it was.

Q Did you end up going, you and Officer McCallister and Sergeant Wenturine, to a house on the corner of Pennsylvania and Laura Street?

A Yes.

Q When you got there did you end up seeing either a wallet or identification or both that belonged to an Anthony Covington?

A I remember identification I picked up from the porch. I do remember there was a wallet but I don't remember touching that.

Q All right. The identification that you saw, was that inside the back yard on the porch?

A Yes.

* * *

[82] THE COURT: Cross?

CROSS-EXAMINATION

BY MR. SELBURN:

Q Officer, what time did you get the call to go to the gas station?

A I think I recall it was approximately around 3:20 in the morning.

Q If you looked at your PCR would that help?

A Yes. I have written down 3:25.

Q So it's 3:25?

A Yes

Q And when you got there what other police officers were already, who, which other police officers were already there?

A We were the first to show up, myself and my partner.

Q And your partner was?

A McCallister.

Q You observed a man on the pavement?

A Yes.

Q Where was he located?

A Just outside the vehicle on the driver's side.

Q And where was that vehicle located?

A The vehicle, I believe, I recall was between the actual gas station and the first set of pumps.

Q All right. Was the door open, the driver's door open on [83] that vehicle?

A The driver's door was open.

Q And where was he in relation to the car?

A He was lying just outside the door, say, within I think two feet of actually getting into the vehicle. He was kind of, I guess kind of laying perpendicular to the vehicle.

Q Okay. He's near the door?

A Yes, driver's door.

Q Is he behind that door towards the rear?

A Behind that door. I would say yes, he was right about the middle of the vehicle. I think so.

Q In the area where the opening to the door would be?

A Yes.

Q Were you driving or your partner?

A My partner was driving.

Q Okay. And when you got there at the gas station what did you, what's the first thing you did?

A I approached the subject, the victim, Mr. Covington, on the ground and had asked something like what happened or are you okay, something to that line.

Q Okay. He's conscious?

A He is conscious.

Q Did your partner go with you?

A Yes. Yes. He followed right behind me.

[84] Q So you asked this man how are you, how are you doing?

A Well, basically it's, you know, what's wrong, you know.

Q Okay. And what does he tell you?

A Said I been shot.

Q Now I see you kind of moved your arm, your hand?

A Yeah, he's holding, he's holding his side. He's laying on the side with the wound up and he's kind of holding the side.

Q Which side? Because the first time you gestured you gestured over to the left. This time you did it on the right?

A I believe he was laying down like this on the ground. I believe he was holding his right side.

Q Down near the stomach area?

A Yes.

Q Did you see the wound?

A Yes, I did.

Q You had to move some clothing to do that?

A. Yes.

Q All right. After you ask him how is he and he tells you he's been shot what's the next thing you ask him?

A I believe I asked him where did it happen.

Q And that's when he told you over on Pennsylvania?

A Uh-huh.

Q That's a yes?

[85] A I'm sorry, yes.

Q And but he doesn't give you an address?

A Did not give an address.

Q And he didn't give you a cross street?

A He said it was a cross street, didn't know the name of it.

Q Okay. And what did you ask him next, who did it?

A Well, I believe I asked him to describe the house, which he did.

Q Okay.

A And then do you know who did this.

Q Okay. You asked him do you know who did this?

A I believe so.

Q And he tells you what?

A He said it is a guy named Rick or also called Buster.

Q He told you all that or did you ask him does he have any other names?

A No. He told me all that.

Q He told you all that?

A Yes.

Q Okay. Did he also at the same time tell you what he looked like and height and weight?

A Well, I had then followed with a description, can you give me a description of him.

Q Okay. And do you recall what that description was?

[86] A I'd have to refer to my PCR real quick.

Q Did you get the impression he knew this person?

A Yes. What I have written down is a black male, approximately 40 between five seven and 140 pounds light completed.

Q Did he give you all that description at once or did you kind of draw it out of him, how tall is he, and he gives a height?

A Yes, I –

Q You said how tall is he?

A Correct.

Q He says five, five. How much does he weigh? He says 140. Is that about how it goes?

A Right. This is all approximate, yes.

Q And then you ask him complexion?

A Yes.

Q Did you ask him do you know his last name?

A I believe I probably did.

Q And what was his response?

A I didn't write it down so I believe it probably would have been no.

Q If he had told you a last name you would have written it down, wouldn't you?

A I believe so.

Q That'll be pretty important?

[87] A Yes. Yes.

Q That's the purpose of a PCR is to record the important information?

A Yes.

Q You go through a lot of cases and you can forget details if you don't write it down?

A Sure, yes.

Q Now while you're asking him all these questions it's just you and your partner McCallister, right?

A At the start of it, and I believe another scout unit arrives on scene.

Q All right. And do you know who is in that unit?

A It was Officer Brown and Pellerito.

Q And did they join you or did they do anything else to secure the area?

A They, I think they did a little bit of both. I also recall looking at the gas station clerk, seeing if he because at first they didn't know if it happened there or not. He said that the guy just drove up.

Q Okay. Okay. So you have some concern, there may be a person with a gun or somebody, a shooter right there in an immediate area?

A Sure, yes.

Q And you want to see that that area gets secured?

A Correct.

[88] Q For your safety as well as everyone else?

A Correct.

Q When, the other scout car had arrived had you already obtained the information that you've already told us about?

A I believe I obtained most of it.

Q Did you convey that information to the other officers, tell them what you had learned?

A I believe I might have stated it as they were asking the questions again, I believe that's the way it probably happened, that way.

Q Okay. So you think they came over and asked him the same questions you had asked him?

A I think they did.

Q And then you said, well, I've already found all that out?

A I think, yeah.

Q It was hard for this man to talk?

A Not at first but it was slowly depreciating there.

Q Okay. He was in pain?

A Yes.

Q There was no need to keep asking him the same questions over and over, agreed?

A Well, I don't know if I agree with that. You always want to ask them the questions, make sure you got it right.

Q Well, did you think you got it wrong?

[89] A No, they just, I guess a way of double-checking.

Q Now, how many shots did he say were fired?

A I recall he said it was two.

Q And did he tell you he was hit by the first shot or the second shot?

A I believe he said it was the second shot.

Q How long did you remain there at the gas station?

A I remained there till EMS arrived and then conveyed the victim to the hospital.

Q All right. How long did it take you after you received the call, the run? How long did it take you to get there?

A We were really close. That's why we were first, arrived first, say, within a couple minutes, I think.

Q Okay. So you stayed until EMS had actually removed him from the gas station seat?

A Actually I don't know if they had removed him, I know that I stayed there. The EMS was there.

Q Once EMS arrives is that pretty much when you stopped questioning him?

A That's when I pretty much stopped questioning him, yes.

Q Well, you kind of got to get out of the way of the EMS guys, don't you?

A Well, you got to let them do their job.

Q They've got work to do?

[90] A Yes.

Q So what did you do then at the gas station once EMS arrived?

A My, my sergeant had arrived on scene, you know, prior, I believe just prior to that or during that and I started conveying the information to him.

Q When you say he arrived just prior or during that, what is that?

A The EMS.

Q Okay. So you think he got there right around the same time as EMS?

A I believe so.

Q And once you left that gas station where did you go?

A We went onto the street Pennsylvania and to the house.

Q And when you, when you say we, that's you and your partner?

A Correct.

Q Was anyone there when you got there, I'm referring to police officers?

A At the scene?

Q At the house.

A At Pennsylvania?

Q Yes.

A No.

Q You were the first ones there?

[91] A Yes.

Q What did you do when you got there?

A We took a tactical position to outline the exits of the house to keep an eye on it just in case someone exits the house.

Q Was the house – was any lights on?

A I don't recall any.

Q How about exterior lights?

A I believe there was a street light on Laura.

Q Okay. How about, how about a porch lights, anything like that?

A I don't, I don't think there was.

Q So you didn't try to get into the house?

A Not – no, not at first.

Q You didn't knock on the door to see if anyone was there?

A Not at first.

Q What position did you take?

A I was just, I was on the corner of Laura and Pennsylvania basically by my squad car for some type of cover so I could see the front of the house and also see my partner which had took a position to the rear by the alley seeing the back door.

Q Where was your car?

A My car was actually parked on Pennsylvania, just east of Laura.

[92] Q Where is it in relation to the house?

A Front. And then the east front of the house it was on Pennsylvania. The front of the house faces, faces Pennsylvania east and west.

Q All right.

A And so my vehicle was east, just on the, passed the side of the cross street of Laura, right over here. Okay. And this is a fully marked scout car?

A Yes, it is.

Q It's got the lights on it. It's got the Detroit police emblem on it?

A That's correct.

Q So when you got there and positioned yourself you hadn't conducted any type of search around the house, true?

A Not at first.

Q You were concerned there might be somebody inside that house with a gun?

A Correct.

Q You're waiting for back up?

A Yes.

Q And did any back up come?

A Yes, there was another, there was another unit. I don't recall who it was.

Q All right. At what point was it that you started to look around?

[93] A We tried to we keep an eye on the house to see if there was any movement, any lights for a period of time, and then after we decided there was no movement around the house then we checked the back door because that's where the victim had said he had been shot.

Q He said the back door?

A Yes.

Q So what were you checking for?

A To see if there was any clues, to see if that was one in factual, actual, actual house to see if we had any clues to see if there was any blood from the victim at all.

Q So you went back there looking for blood?

A That was one thing I was looking for.

Q And you found what you thought was blood?

A Yes.

Q Where did you find it?

A I believe I found some coming off the porch, maybe at the, on one of the steps and then on the sidewalk I believe, too.

Q You didn't touch that blood, did you?

A No.

Q That's a no. No?

A That's correct.

Q And you found an I.D. card on the porch?

[94] A Yes, I believe I found an I.D. card. It was on the porch at the time.

Q Did you pick it up?

A Yes, I did.

Q Now when you were back at the station, the man that was laying there, he never told you what his name was, did he?

A Yes. Yes. I had to get a name, date of birth from him to actually know, to either put on the reports or in case something happens to give it to the EMS driver.

Q So you got his name and his date of birth?

A Yes, that is, that's my procedure of doing things.

Q Did you find anything else at the scene at the house when you were making your search outside?

A I recall finding a pair of glasses and a, and a, like a spent, a bullet laying on the porch.

Q Where were the glasses?

A I believe they were just either on the porch itself or on the stairs.

Q Now, you recorded all that in your PCR?

A Yes.

Q You recorded what you found?

A Yes.

Q And that's so that you can recall at a future date?

A Yes.

Q It's also to convey the information to the investigators [95] that are gonna work on the case?

A That is correct.

Q Anything else you found?

A I believe I've said everything that I discovered.

Q So you didn't find a bullet hole?

A Well, I saw a bullet hole. I didn't have – I saw a bullet hole. Yes, I didn't find it.

Q Okay. You saw a bullet hole?

A Yes.

Q Where?

A In the door. I believe it was a wood door. It was just small hole that was protruding.

Q So you recorded that in your PCR as well?

A I don't, I don't think I put that in my report.

Q That's kind of an important piece of information, isn't it?

A Well, it's also important, but I guess I thought the evidence techs would cover that.

Q Did you record the date of birth of Mr. Covington that you obtained?

A I'd have to look, I just have age.

Q So it's important that you get his date of birth but it's not important to record it?

A I use that procedure and the report asks for the age, race, sex. Sometimes that information is used in the [96] narrative but I usually record that either on a piece of paper or a notebook.

Q What did you do with that I.D. card after you picked it up?

A I believe I either gave it to, I think I gave it to my sergeant but I might have also gave it to my partner.

Q You did not put it back down on the porch where you had found it?

A I remember. I remember being there when it was placed back down, I think back on the porch. Yeah.

Q What do you say then?

A I think, I think I was there when either might have been, I think it might have been my partner or my sergeant that placed it back on, back onto the porch at the time.

THE COURT: I'm sorry, we're gonna have to take a brief recess right now. I have to make a phone call to Judge Youngblood five minutes.

COURT OFFICER: All rise for the jury.

(Jury excused at 12:08 p.m.)

COURT OFFICER: You may be seated.

(short recess)

THE COURT: Are we ready, gentlemen?

MR. SIMON: Yes, we're ready to continue with Officer Stuglin.

COURT OFFICER: All rise for the jury.

* * *

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. RICHARD PERRY BRYANT, Defendant-Appellant.	UNPUBLISHED March 6, 2007 No. 247039 Wayne Circuit Court LC No. 02-005508 ON REMAND

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court for reconsideration of defendant's Confrontation Clause claim in light of *Davis v Washington*, ___ US ___; 126 S Ct 2266; 165 L Ed 2d 224 (2006). We, again, affirm defendant's convictions of second-degree murder, MCL 750.317, felony firearm, MCL 750.227b, and felon in possession, MCL 750.224f.

The Sixth Amendment of the United States Constitution guarantees the right of a criminal accused "to be confronted with the witnesses against him. . . ." See, also, Const 1963, art 1, § 20. In 2004, the United States Supreme Court articulated a bright-line rule against admission of custodial statements by a nontestifying witness against a criminal defendant. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158

L Ed 2d 177 (2004). The Court held that the Confrontation Clause recognizes confrontation, or cross-examination, as an indispensable means of testing the truthfulness of testimonial assertions, and does not admit of substitution by other means. *Id.* Accordingly, the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. The Court elected not to attempt to set forth comprehensive criteria for determining what constituted testimonial statements for this purpose. *Id.* at 53 n 4.

In *Davis*, *supra* at 2273-2274, the United States Supreme Court refined its definition of testimonial statements, holding:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In that case, an issue was whether a domestic violence victim's statements made in response to a 911 operator's interrogation were testimonial. The *Davis* Court stated that the question, "then, is whether,

objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements."

The *Davis* Court considered the factual circumstances presented, noting that (1) the statements were made "about events as they were actually happening," (2) "any reasonable listener would recognize that [the victim] was facing an ongoing emergency and that the call "was plainly a call for help against bona fide physical threat," (3) "the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than to simply learn what had happened in the past," and (4) the statements were not formally taken in that they were made by the victim while in a frantic state, over the phone, in an environment that was neither tranquil nor safe. *Id.* at 2276-2277. The Court concluded that the circumstances of the interrogation objectively indicated that "its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not testifying. What she said was not a weaker substitute for live testimony." *Id.* at 2277.

Here, defendant claims that Anthony Covington's statements to police before he died of gunshot wounds were testimonial in nature; therefore, defendant's rights under the Confrontation Clause, US Const, Am VI, were violated by their admission into evidence. Again, after review for plain error affecting

defendant's substantial rights, we disagree.[1] See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The record reveals that, at about 3:30 a.m., the police responded to a radio run involving a man shot at a gas station. The first three police officers arrived at the gas station within a couple minutes of receiving the call and found the victim, Covington, laying on the ground, on the driver's side of his vehicle, between the first set of gas pumps and the front door of the station. Two other officers arrived shortly thereafter. The officers did not know if the shooting occurred at the gas station and the gas station clerk, who called for assistance, did not know where it happened. Covington was in obvious pain – as the officers concluded by his moaning, facial expressions, difficulty breathing, and difficulty talking. The officers consistently testified that they approached Covington and asked what happened.[2] Covington replied that he had been shot and that "Rick" shot him. He was asked where it happened, and Covington said that he was shot at a house on the corner of Pennsylvania, which he proceeded to describe. Covington further indicated that he had been standing at a

---

[1] Defendant raised this issue for the first time on appeal.

[2] The police officer testimony conflicts as to which officer was the first to speak to Covington but all fairly consistently testified as to the questions that were asked and the progression of the questioning, although Covington may have volunteered some of the information unaided by questioning.

closed door of the house on Pennsylvania having a conversation with somebody through the door, whose voice he recognized as Rick's, when shots were fired through the door and he was hit. Covington was asked to describe "Rick" and he gave a description of "Rick."

Defendant argues that Covington's statements were testimonial because they resulted from police questioning aimed at developing evidence relevant to past criminal behavior. Defendant claims that there were no exigent circumstances, nor any immediate threat to Covington because he was not at the scene of the actual shooting at the time the statements were made. Defendant's argument is flawed.

The police were, indeed, responding to an emergency – someone at the gas station was shot and laying on the ground. They approached the person laying on the ground in obvious distress, not knowing for sure whether he was the purported shooting victim, and asked "what happened?" Covington replied that he was shot and that "Rick" shot him. The police asked Covington where the shooting occurred. Covington said that he was shot at a house on the corner of Pennsylvania and he described the house, as well as the circumstances of the shooting. Covington was asked to describe "Rick." The questioning was used to establish (1) if Covington was the shooting victim, (2) if the shooting occurred at the gas station and, thus, whether there was a continuing threat to their safety and the public's safety, and (3) whether the shooter, as described, followed Covington to the gas

station, which was only a few blocks from the house on Pennsylvania, and was still at the gas station. Further, the statements were about an event that had just happened, Covington was obviously critically injured, and the statements were made while he was lying on the ground in great physical distress. In sum, Covington's statements were made in the course of a police interrogation under circumstances objectively indicating that its primary purpose was to enable police assistance to meet an ongoing emergency.

We are cognizant of the fact that Covington's statements would also assist the police in their investigation of the shooting. But, the focus of the analysis is on the *primary* purpose of the interrogation. Here, the police officers were faced with a shooting – the victim was on the ground, in obvious distress, and it was unknown when or where the shooting occurred. The five police officers who responded to the emergency call had virtually no information and had to assess the potentially dangerous situation as quickly as possible in an attempt to secure the victim's, their own, and the general public's safety. The questions they asked Covington were consistent with that purpose. Although the information garnered from the questioning was used in the ensuing investigation and later criminal prosecution, the statements made by Covington to the police in the course of the interrogation were nontestimonial and not subject to the Confrontation Clause. Therefore, defendant has failed to establish plain error affecting his substantial rights. See *Carines*, *supra*. In light of our resolution of

this issue, defendant's sufficiency of the evidence claim, again, fails.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
APR 29 2010
OFFICE OF THE CLERK

No. 09-150

In The
Supreme Court of the United States

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

RICHARD PERRY BRYANT,

Respondent.

On Writ Of Certiorari To The Michigan Supreme Court

PETITIONER'S BRIEF ON THE MERITS

KYM L. WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals

LORI BAUGHMAN PALMER*
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
(313) 224-2698
lpalmer@co.wayne.mi.us

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Are preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting nontestimonial because "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Summary of Argument	4
Argument	6
I. Preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual	6
A. Introduction	6
B. Elevating Form Over Substance: The Danger of Focusing on the Illustrative Reasoning in *Davis* Rather Than on the Test Itself	9
C. Towards a More Complete Understanding of "Ongoing Emergency"	12
Conclusion	17

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Crawford v Washington, 541 U.S. 36 (2004) 2, 6, 7, 9, 10

Davis v Washington, 547 U.S. 813 (2006) ..... *passim*

Hiibel v Sixth Judicial District Court of Nev., 542 U.S. 177 (2004) 15

Ohio v Roberts, 448 U.S. 56 (1980) 2

United States v Arnold, 486 F.3d 177 (6th Cir. 2007) 11, 15

STATE CASES

Anderson v State, 163 P.3d 1000 (Alaska App. 2007) 12

Collins v State, 873 N.E.2d 149 (Ind. App. 2007) 12, 15

Commonwealth v Allshouse, 985 A.2d 847 (Penn. 2009) 11

Commonwealth v Simon, 923 N.E.2d 58 (Mass. 2010) 15

People v Bryant, 483 Mich. 132, 768 N.W.2d 65 (2009) 10

People v Nieves-Andino, 872 N.E.2d 1188 (N.Y. App. 2007) 11, 14, 15

People v Warsame, 735 N.W.2d 684 (Minn. 2007) 14, 15

TABLE OF AUTHORITIES – Continued

Page

Rankins v Commonwealth, 237 S.W.3d 128 (Ky. 2007) 10

State v Alvarez, 143 P.3d 668 (Ariz. 2006) 12

State v Ayer, 917 A.2d 214 (N.H. 2006) 11, 12, 15

State v Camarena, 176 P.3d 380 (Or. 2008) 11

State v Koslowski, 209 P.3d 479 (2009) 12

State v Shea, 965 A.2d 504 (2008) 12, 15

Wright v State, 916 N.E.2d 269 (Ind. App. 2010) 11

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. VI 1

U.S. Const., Amend. XIV 1

28 U.S.C. §1254(1) 1

LAW REVIEW ARTICLES

Shanes, Hon. Daniel B., Confronting Testimonial Hearsay: Understanding the New Confrontation Clause, 40 Loy. U. Chi. L.J. 879 (2009) 6

OPINIONS BELOW

The original opinion of the Michigan Court of Appeals is unpublished, and appears in the Appendix to the Petition for Certiorari at 1A. The opinion of the Michigan Court of Appeals on remand is unpublished, and appears in the Joint Appendix at 147. The opinion of the Michigan Supreme Court appears in the Appendix to the Petition for Certiorari at 8A and is published at 483 Mich. 132, 768 N.W.2d 65 (2009).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . "

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the pre-dawn hours of April 29, 2001, Detroit Police officers were dispatched to a gas station in Detroit on a report of a person shot. J.A. 33-34. When they arrived, they found Anthony Covington lying on the ground next to the driver's side door of his car in the gas station driveway. J.A. 34-35, 44, 80, 100-101. Covington had blood across the front of his torso. J.A. 11, 35, 49. Various officers asked Covington "What happened," and Covington responded, "I've been shot" and said he needed EMS.[1] J.A. 21, 36, 49, 56, 127, 131-132. At least one officer asked Covington who shot him, and Covington answered that Rick shot him. J.A. 22. Covington seemed to be in pain, talked haltingly, had trouble breathing, and would stop and grab his side like he was in pain. J.A. 8, 38-39, 41, 75,

[1] The record in this case lacks specificity, but not through any fault on behalf of the parties at trial. At the time the case was tried, *Crawford v Washington*, 541 U.S. 36 (2004), and *Davis v Washington*, 547 U.S. 813 (2006), had not yet been decided; the questioning and argument at trial reflected that *Ohio v Roberts*, 448 U.S. 56 (1980), controlled at the time. Therefore, the level of detail about circumstances relevant under *Davis* (i.e., exact questions asked, exact answers given, when in the course of events questions were asked and answered, how much time had lapsed when statements were made) is lacking.

83, 101, 111. Covington said that he went to a friend's house, knocked on the door, had a conversation through the door with Rick (whose voice he recognized), and then Rick shot him through the door. J.A. 12-13, 37-38, 76, 102, 114, 120, 127-128. Covington said that he had been shot around 3:00am (the police were dispatched around 3:25am). J.A. 39, 79, 105, 129. Covington said that he was shot at 4203 Pennsylvania, about six blocks away from the gas station, and then drove himself to the gas station. J.A. 14, 39-40, 60. He also gave a description of "Rick," saying he was a light-complected black male, 40, 5'7" and around 140 pounds. J.A. 85, 103, 134. Once EMS arrived and began tending to Covington, the officers ceased questioning him. J.A. 103, 117, 138. Approximately five to ten minutes elapsed between the time the officers arrived on the scene and the time paramedics arrived. J.A. 41, 56. The officers then went to 4203 Pennsylvania to try to locate and apprehend the shooter. J.A. 139-141. Covington died several hours later. Pet. App. 1A.

Covington's statements were admitted at Respondent's trial as excited utterances, and he was convicted of second-degree murder, among other charges. J.A. 70-72; Pet. App. 10A. On June 10, 2009, the Michigan Supreme Court held that the statements taken from Covington at the gas station were testimonial and admitted in violation of the Confrontation Clause, requiring reversal under the "plain-error" standard of review for forfeited error. Pet. App. 8A.

SUMMARY OF ARGUMENT

When 911 calls or interrogation by first responders is at issue, a declarant's statements are nontestimonial under the Confrontation Clause of the Sixth Amendment when, objectively viewed, the primary purpose of the interrogation is to meet an ongoing emergency. This test controls the inquiry: although the Court provided illustrative reasoning in *Davis v Washington*, that reasoning cannot be used to bar statements meeting the "ongoing emergency" test. The factors mentioned in *Davis* were sufficient to establish that the statements were nontestimonial – they are not, however, necessary to reach that conclusion.

Consistent with *Davis*' focus on whether the declarant is proclaiming an emergency and seeking help, the term "ongoing emergency" encompasses both crimes in progress and situations in which the declarant or officer is danger, either due to a medical emergency or because the perpetrator poses a threat. An "ongoing emergency," then, is not limited to discrete criminal acts and includes other emergencies resulting from those criminal acts.

Interrogations whose objective primary purpose is to assess and address a party's emergency medical condition, including questions regarding the circumstances surrounding the injury, will therefore often be nontestimonial. Similarly, questions aimed at ascertaining the identity and location of an armed perpetrator are also nontestimonial, as the existence of an

unknown perpetrator with a weapon presents a potentially immediate danger to the declarant, the officers, and others. The officers need to ascertain the perpetrator's identity and location in order to assess the situation and determine the extent of the risk and danger, and interrogations with that primary purpose are designed to meet an ongoing emergency.

The above applications of *Davis*' "primary purpose" test allow the Confrontation Clause to bar the formal, testimonial statements it was designed to guard against without impermissibly expanding the Clause to bar informal statements not designed to solemnly establish or prove some fact.

ARGUMENT

I. Preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual.

A. Introduction

In *Crawford v Washington*,[2] this Court redefined its understanding of the Confrontation Clause, "jettisoning a quarter-century of 'reliability' jurisprudence in favor of a new" analysis rooted in the historical development and understanding of the Confrontation Clause.[3] The Court noted that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of *ex parte* examinations as evidence of the accused," and concluded that "[t]he Sixth Amendment must be interpreted with this focus in mind."[4] Consistent with the method of obtaining those *ex parte* examinations, the Court noted that the term

---

[2] *Crawford v Washington*, 541 U.S. 36 (2004).

[3] Shanes, Hon. Daniel B., *Confronting Testimonial Hearsay: Understanding the New Confrontation Clause*, 40 Loy. U. Chi. L.J. 879 (2009).

[4] *Crawford, supra*, 541 U.S. at 50.

"witness" refers to those who "bear testimony."[5] This necessarily includes some sense of formality or solemnity, as the Court in *Crawford* noted in defining "testimony" to typically include "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[6] The Court concluded that testimonial statements of witnesses absent from trial may only be admitted if the declarant is unavailable and the defendant had a prior opportunity to cross-examine.[7]

The question remaining, of course, was what made a statement "testimonial." The Court in *Crawford* declined to enunciate a comprehensive definition, concluding: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed."[8] Two years later, the Court again confronted the meaning of "testimonial" in the companion cases of *Davis v Washington* and *Hammon v Indiana*,[9] this time in the context of statements made to law enforcement during a 911 call or at a crime scene. In further defining

---

[5] *Crawford, supra*, 541 U.S. at 51 (citation omitted).

[6] *Crawford, supra*, 541 U.S. at 51 (citation omitted).

[7] *Crawford, supra*, 541 U.S. at 59.

[8] *Crawford, supra*, 541 U.S. at 68.

[9] *Davis v Washington* and *Hammon v Indiana*, 547 U.S: 813 (2006).

the term, the Court in *Davis* and *Hammon* focused on the presence or absence of an ongoing emergency:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[10]

In other words, when objective indications show that an interrogation's primary purpose is to help police handle an ongoing emergency, then the declarant is simply "not acting as a *witness*" or testifying, as "[n]o 'witness' goes into court to proclaim an emergency and seek help."[11] On the heels of *Davis*, as may be expected, new uncertainty has arisen: what exactly constitutes an "ongoing emergency"?

---

[10] *Davis, supra*, 547 U.S. at 822.

[11] *Davis, supra,* 547 U.S. at 828.

B. Elevating Form Over Substance: The Danger of Focusing on the Illustrative Reasoning in *Davis* Rather Than on the Test Itself

The Court in *Davis* did not define "ongoing emergency." The Court did, however, give four reasons why the declarant's statements in *Davis* were different than the declarant's statements in *Crawford*:

- In *Davis*, the declarant was speaking about events "*as they were actually happening*, rather than 'describ[ing] past events.'"
- In *Davis*, the declarant's call was "plainly a call for help against a bona fide physical threat."
- Viewed objectively, the questions and answers in *Davis* "were necessary to be able to *resolve* the present emergency, rather than to simply learn . . . what had happened in the past."
- The declarant in *Davis* made informal statements "in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe."[12]

Nowhere in its opinion did the Court hold that the above factors were *required* for a situation to constitute an ongoing emergency and a statement to be

---

[12] *Davis, supra*, 547 U.S. at 827 (emphasis in original).

nontestimonial; rather, the Court used the above reasons to illustrate the difference between the statements in *Davis* and *Crawford*. In other words, while the above circumstances were *sufficient* to show that the declarant's statements were made under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency, it does not follow that they are *necessary* to do so.

Unfortunately, rather than focusing on the actual holding of *Davis* – that statements made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency are nontestimonial, and that statements made when the circumstances objectively indicate that there is no ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution are testimonial – some courts have instead turned *Davis*' four illustrative reasons into a rigid four-part test. Just as the Michigan Supreme Court so held in this case, some courts find that the failure to meet any of the four reasons provided in *Davis* automatically negates the existence of any ongoing emergency and renders the statements testimonial.[13] This method of analysis elevates form over

---

[13] *See People v Bryant*, Pet. App. 13A-21A; *Rankins v Commonwealth*, 237 S.W.3d 128, 131 (Ky. 2007) (citing *Davis* in holding that "statements that tell 'what is happening' are

(Continued on following page)

substance and leads to conclusions such as the one here from the Michigan Supreme Court, where the presence of a man lying on pavement bleeding from a gunshot wound from an unknown assailant is not considered an ongoing emergency.

Most courts, however, have recognized that the factors given in *Davis* are not necessary conditions, but are instead illustrative aids – they are meant to *inform* the inquiry, not control it.[14] Instead, the focus should be on the definition set forth in *Davis*: objectively viewed, is the primary purpose of the interrogation to meet an ongoing emergency or to establish or prove past events potentially relevant to later criminal prosecution? The other factors mentioned in *Davis* instruct the inquiry, but the presence or

---

non-testimonial, while statements that tell 'what happened' are testimonial").

[14] *See, e.g., United States v Arnold*, 486 F.3d 177 (6th Cir. 2007) (en banc) (fact that declarant drove around the corner from the scene and used past tense during the 911 call did not mean there was no ongoing emergency); *Wright v State*, 916 N.E.2d 269 (Ind. App. 2010) (finding use of past tense not dispositive); *Commonwealth v Allshouse*, 985 A.2d 847 (Penn. 2009) (finding that primary purpose test was not reliant on the temporal relationship between the statement and the wrong it describes); *State v Camarena*, 176 P.3d 380 (Or. 2008) (finding ongoing emergency even when declarant's 911 call described an attack that had passed); *People v Nieves-Andino*, 872 N.E.2d 1188 (N.Y. App. 2007) (holding circumstances can objectively indicate an emergency even if police ask declarant "what happened"); *State v Ayer*, 917 A.2d 214 (N.H. 2006) (finding ongoing emergency even when police responded and interrogated after shooting had occurred).

absence of any one factor is not outcome determinative.[15]

C. Towards a More Complete Understanding of "Ongoing Emergency"

Courts that have addressed the definition of "ongoing emergency" have generally held that the term encompasses (1) a crime still in progress, and (2) situations in which the declarant or officer is in danger, either because of a medical emergency or because the perpetrator poses a threat.[16] This definition comports with the focus of *Davis* – whether the declarant is proclaiming an emergency and seeking help or formally establishing the facts of a past crime. Further, the two parts of the definition are not necessarily linked: in other words, the existence of an ongoing emergency is not dependent on the crime still being in progress. After all, the term "emergency" is not limited to criminal acts: criminal activity often sets in motion other emergencies.[17] Indeed, that happened here – although the shooting of Covington had

---

[15] *See Collins v State*, 873 N.E.2d 149, 154 n. 2 (Ind. App. 2007) (finding that the four factors in *Davis* are not an exhaustive list, will not be relevant in all cases, and were not "elements" to be satisfied before testimony can be considered nontestimonial).

[16] *See, e.g., State v Koslowski*, 209 P.3d 479, 484 n. 7 (Wa. 2009); *State v Shea*, 965 A.2d 504, 508-509 (Vt. 2008); *Anderson v State*, 163 P.3d 1000 (Alaska App. 2007).

[17] *See State v Alvarez*, 143 P.3d 668, 674 (Ariz. 2006); *State v Ayer*, 917 A.2d 214, 225 (N.H. 2006).

ended by the time police arrived at the gas station, the medical emergency and potential danger caused by the shooting were ongoing. For this reason, focusing myopically on whether the interrogation or statements use the past or present tense obscures the focus on whether the primary purpose of the statements was to enable police assistance to meet an ongoing emergency, as often information about past events is needed to properly assess and address a current emergency. This Court recognized as much in *Hammon*, stressing that, although the Court rejected the implication of the Indiana Supreme Court that virtually all "initial inquiries" at a crime scene (which normally occur after the crime has been completed) would be nontestimonial, it was not holding "that *no* questions at the scene would yield nontestimonial answers."[18]

This is particularly true when, as here, police are confronted with not only the report of a possible crime, but a person in need of emergency medical attention. It strains credulity to assert, as the Michigan Supreme Court did here, that police responding to a shooting who find a man lying on the ground, in pain, bleeding, and having difficulty breathing are not presented with an ongoing emergency.[19] Nothing in *Davis* limits "ongoing emergency" to "an ongoing criminal episode," as asserted by the Michigan Supreme

---

[18] *Hammon, supra,* 547 U.S. at 832 (emphasis in original).

[19] Pet. App. 19A.

Court.[20] This ignores the reality that a completed criminal act can result in an ongoing emergency. Injuries requiring emergency medical attention present the "bona fide physical threat" discussed in *Davis*, and the interrogations concerning those injuries by first responders are usually conducted on the scene, lacking any formality.[21] Questions by first responders that assess and address a declarant's medical condition will often qualify as interrogations designed to meet an ongoing emergency. In order to assess a party's injuries to determine whether immediate medical attention is necessary and whether additional assistance will be needed from paramedics, "officers must inevitably learn the circumstances by which the party was injured."[22] If the circumstances of the interrogation objectively indicate that that is the primary purpose for obtaining the information, then the statements are nontestimonial, regardless of whether the crime itself is no longer in progress.

In the same way, as this Court noted in *Hammon*, initial inquiries regarding the identity of the perpetrator, particularly when the crime involves a weapon, often produce nontestimonial statements under this definition when the primary purpose is to learn "'whom [the officers] are dealing with in order to assess the situation, the threat to their own safety,

---

[20] Pet. App. 19A.

[21] *Davis, supra*, 547 U.S. at 827.

[22] *People v Warsame*, 735 N.W.2d 684, 693 (Minn. 2007). *See also Nieves-Andino, supra*, 872 N.E.2d at 1190.

and possible danger to the potential victim.'"[23] Until the identity and location of the perpetrator is ascertained, the police have no way of knowing whether an armed and possibly dangerous suspect may be at the scene or return to the scene, potentially placing the declarant and the officers in immediate danger and presenting an ongoing emergency.[24] Interrogation with the primary purpose of determining this degree of continuing risk and the appropriate response to that risk is nontestimonial under *Davis*.[25] Similarly, when an officer arrives on the scene and does not know where the perpetrator is, whether he is armed, whether he might have other targets, and whether the violence might continue at the scene or elsewhere, interrogation that has the primary purpose of establishing those facts to assess the situation is designed to meet the ongoing emergency and is nontestimonial.[26]

---

[23] *Hammon, supra,* 547 U.S. at 832, quoting *Hiibel v Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004). *See also Commonwealth v Simon*, 923 N.E.2d 58, 74 (Mass. 2010) (citation omitted).

[24] *See Collins, supra*, 873 N.E.2d at 154 (finding that "the capture of an alleged murderer who was then at large and very possibly armed and dangerous" constituted an ongoing emergency).

[25] *Shea, supra*, 965 A.2d at 510.

[26] *Ayer, supra*, 917 A.2d at 224-225 (N.H. 2006). *See also Warsame, supra*, 735 N.W.2d at 694-695; *Nieves-Andino, supra*, 872 N.E.2d at 1190; *Arnold, supra*, 486 F.3d at 190-191.

Here, police responded to a report of a man shot. They had no other information when they arrived at the scene and found Covington lying on the ground next to his car, bloody, in pain, having trouble breathing, and asking for emergency medical services. Viewed objectively, the primary purpose of the officers' interrogation of Covington, and of Covington's responses, was to enable the officers to meet an ongoing emergency, which consisted of both Covington's life-threatening injury and the fact that the police had no idea if a gunman was in the immediate vicinity or planning more violence, or if there were other victims. In other words, the officers' questions concerning what had happened, who had shot Covington, and where the shooting occurred primarily served to assess Covington's medical emergency and the danger to Covington, the officers, or others, both of which constituted ongoing emergencies at the time of the interrogation.[27] The fact that the officers and Covington used the past tense or that Covington had already been shot when the police

---

[27] Indeed, had Covington had access to a phone and made precisely the same statements that he made to the responding officers to a 911 operator instead, it seems clear that *Davis* would allow the admission of the statements. *Davis, supra*, 547 U.S. at 827. Similarly, had the declarant in *Hammon* been sitting on the porch, bleeding, in obvious pain, and having trouble breathing, doubtless initial inquiries designed to determine the cause of her injuries and the identity and location of the perpetrator would have been nontestimonial because an ongoing emergency existed, regardless of the fact that the act that caused the injuries was no longer ongoing.

arrived did not negate the ongoing emergency occurring when the police responded to the scene. To hold otherwise applies the Confrontation Clause to bar statements far removed from the formal civil law *ex parte* examinations the Clause was principally designed to address and elevates the four illustrative factors given in *Davis* above the Court's holding that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

CONCLUSION

Wherefore, Petitioner respectfully requests that this Court reverse the Michigan Supreme Court.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research, Training,
and Appeals

LORI BAUGHMAN PALMER
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
(313) 224-2698
lpalmer@co.wayne.mi.us

RESPONDENT'S BRIEF

No. 09-150

IN THE

Supreme Court of the United States

STATE OF MICHIGAN,

Petitioner,

v.

RICHARD PERRY BRYANT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR RESPONDENT

PETER JON VAN HOEK
Assistant Defender
STATE APPELLATE DEFENDER OFFICE
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833
Peter@sado.org

Attorney for Respondent

20471

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Is a statement obtained as a result of police interrogation testimonial, for the purposes of the Confrontation Clause, where the declarant provides solely a narrative of past events and makes no plea for police assistance to meet a current threat, under circumstances where the alleged perpetrator is at large and/or the declarant has suffered an injury?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	10
A statement obtained as a result of police interrogation is testimonial, for the purposes of the Confrontation Clause, where the declarant provides solely a narrative of past events and makes no plea for police assistance to meet a current threat, under circumstances where the alleged perpetrator is at large and/or the declarant has suffered an injury.	10
A. **Police conduct will not be impacted by a subsequent determination of whether a statement was testimonial under the Confrontation Clause.**	14

Contents

Page

B. The fact that an alleged offender is not in police custody at the time the statement is obtained does not, standing alone, render the statement nontestimonial. 17

C. The medical emergency to the declarant did not fall within the Davis definition of an ongoing emergency. 30

D. A definition of nontestimonial statements for purposes of the Confrontation Clause as those made during and part of the events at issue is consistent with the common law doctrine of res gestae statements. 33

E. Mr. Bryant was prejudiced by the lack of opportunity to confront Mr. Covington's statements to the police. 37

CONCLUSION 38

TABLE OF CITED AUTHORITIES

Page

Cases:

Crawford v. Washington, 541 U.S. 36 (2004) ... *passim*

Davis v. Washington, 547 U.S. 813 (2006) ..... *passim*

Hayward v. State, 24 So. 3d 17 (Fla. 2009) 26

King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779) 25, 26, 33

King v. Dingler, 2 Leach 561, 168 Eng. Rep. 383 (1791) 36

New York v. Quarles, 467 U.S. 649 (1984) 15, 24

People v. Wong Ark, 30 P. 1115 (1892) 33

Raile v. People, 148 P. 3d 126 (Colo., 2006) 26

Raleigh's Case, 2 How. St. Tr. 1 (1603) 36

State ex rel J.A., 195 N.J. 324; 949 A.2d 970 (2008) 26

State v. Kirby, 280 Conn. 361; 908 A. 2d 506 (2006) 26

State v. Lewis, 235 S.W. 3d 136 (Tenn., 2007) ... 26

Cited Authorities

	Page
State v. Mechling, 633 S.E. 2d 311 (W. Vir., 2006)	26
United States v. Inadi, 475 U.S. 387 (1986)	36
United States v. Santana, 427 U.S. 38 (1976)	15
Warden v. Hayden, 387 U.S. 294 (1967)	15
United States Constitution:	
Fourth Amendment	8, 14, 17
Fifth Amendment	8, 14, 17
Sixth Amendment	*passim*
Rule:	
Michigan Rule of Evidence 803(2)	3
Other Authorities:	
Fisher, *What Happened – And What Is Happening – To The Confrontation Clause*, 15 J. L. Poly. 587 (2007)	33
Friedman and McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171 (2002)	33

STATEMENT OF THE CASE

The Detroit Police received a call at around 3:25 a.m. on April 29, 2001, indicating that a man had been shot.[1] (J.A. 15, 33-34, 39, 42, 105). Five officers, two teams of two patrol officers and one ranking officer, arrived within moments of each other at the location, a gas station in Detroit. Upon arrival the officers saw Anthony Covington lying on the ground, outside of a vehicle. (J.A. 34). Each of the officers immediately went, individually or with their partners, to question Mr. Covington. All five officers subsequently testified as to out-of-court statements made to them by Anthony Covington.[2]

During the questioning, the officers asked Mr. Covington what happened to him. He responded that approximately 30 minutes prior to arrival of the police at the gas station, he was at a residence located six blocks away from the station. (J.A. 39, 60). He stated he was at the front door of that residence, speaking through the door to someone whose voice he believed was that of a man he referred to as "Rick." (J.A. 12-13, 34). Mr. Covington told the officers that a shot was fired through the door, striking him, and that he left the area after the shooting, driving himself to the gas station. (J.A. 40, 75-76, 102). He acknowledged that he did not

---

1. The state court record does not disclose who made the call to the police, or the exact words used during that call.

2. The testimony of all five officers was presented during the retrial in this matter, after the initial trial resulted in a hung jury and the declaration of a mistrial, either through live testimony or through prior recorded testimony.

see "Rick," nor see who shot him, as the shot was fired through a solid wood door. (J.A. 22-23, 120). When asked if he knew "Rick's" last name, Mr. Covington replied that he did not. (J.A. 114-115). He stated that he knew "Rick" was at times referred to as "Buster." (J.A. 127). He gave the police a description of "Rick" as a black male, approximately 40 years old, five foot seven, and 140 pounds. (J.A. 103). Subsequent police investigation resulted in a description of Richard Bryant as being 30 years old, five foot ten, and 180 pounds. (J.A. 93-94).

At no point did Mr. Covington relate the content of any conversation he was having with "Rick" prior to when the shot was fired. (J.A. 23-24). He told one of the officers that he had been shot in the back while in front of the house. (J.A. 50).

The officers indicated that they could see that Mr. Covington had been shot, as he had blood on the front of his shirt. A couple of the officers asked him briefly about his wound or his medical condition, or asked him to lift his shirt so they could see the wound. (J.A. 19, 57). At one point when Mr. Covington indicated he needed medical assistance, one of the officers assured him that an EMS unit had been dispatched and would be arriving momentarily. (J.A. 21, 56-57). The EMS unit arrived at the gas station a few minutes after the officers, and transported Mr. Covington to a hospital. (J.A. 41). He arrived at the hospital at approximately 4:00 a.m., and died at 9:40 a.m. that morning after undergoing surgery. (T, 11/25/02, 142).

All five of the officers acknowledged that they went immediately to Mr. Covington once they arrived at the

gas station and began asking him what happened to him. (J.A. 17-18, 47, 109, 131). None of the officers indicated that he drew his weapon, looked around the area of the station, or immediately interviewed any employees of the station or bystanders. Officer Michael McCallister acknowledged that he did not investigate the area to see if any shooter was presently there, and did not know if his partner, Officer Joseph Stuglin, had done so. (J.A. 83). Officer Stuglin testified that he did have some general concern that a shooter might be present, but did not relate any actions that either he or any of the other officers took to check the area. (J.A. 136). The ranking officer at the scene, Sgt. Jeffery Wenturine, did not testify to ordering any of his subordinate officers to search the area or question other witnesses. After the EMS ambulance transported Mr. Covington to the hospital, the officers went to the location Mr. Covington indicated was the scene of the shooting. (J.A. 103).

At Mr. Bryant's preliminary examination, over a defense objection, the examining judge admitted evidence of Mr. Covington's statements as an excited utterance under Michigan Rule of Evidence 803(2). (J.A. 12). Prior to the initial trial, defense counsel for Mr. Bryant moved for the trial judge to reverse that earlier ruling. (J.A. 26-28). The prosecutor stated for the record that if the trial judge ruled the statements inadmissible "then we won't have a trial here," but the prosecution would seek to appeal that ruling. (J.A. 31). The trial judge upheld the ruling that the out-of-court statements by Mr. Covington were admissible as excited utterances. (J.A. 70-71).

The initial trial in the case resulted in a hung jury, and a declaration of a mistrial. The remainder of the evidence at the retrial is briefly summarized below.

Mr. Covington was a cocaine addict who used Mr. Bryant as one of his sources for cocaine, according to the testimony of Mr. Covington's brother, Paul Mitchell. Mr. Bryant's residence was down the street from Mr. Covington's and Mr. Mitchell's residence. Mr. Mitchell believed the transactions between Mr. Covington and Mr. Bryant took place at the rear door of the Bryant residence. (T, 11/26/02, 6-7).

Mr. Mitchell testified that Mr. Covington told him he had given a coat to Mr. Bryant as collateral in exchange for cocaine, and during the early evening of April 28th expressed to Mr. Mitchell his intent to retrieve his coat from Mr. Bryant in exchange for the money he owed for the drugs. (T, 11/26/02, 8-9, 12-13). Mr. Mitchell acknowledged that he has known Mr. Bryant for many years, including the five years that they were neighbors, that Mr. Bryant did go by the name "Rick" but that he had never heard Mr. Bryant referred to by any other name, and that Mr. Covington knew Mr. Bryant for three years and knew Mr. Bryant's first and last names. (T, 11/26/02, 11-12, 15).

When the police arrived at the house, they took a "tactical position" outside the house to watch the exits while they called for back-up assistance. (J.A. 140-141). Once the back-up arrived, the officers approached the house and begin to look for evidence. (J.A. 142). Upon their approach to the house, the officers observed some blood, a spent bullet, and eyeglasses on the back porch,

and what appeared to be a bullet hole in the rear door. They also found a wallet, which contained Mr. Covington's identification, on the premises. (T, 11/25/02, 157-158, 182).

The officers knocked at both the front and back doors in an attempt to gain entry into the residence, but no one answered. The officers secured the premises, making sure no one could enter or exit the residence, and sought a search warrant. (T, 11/25/02, 166-167, 185).

In prior recorded testimony that was read to the jury at the retrial, Chiquita Davis, Mr. Bryant's girlfriend, stated that on April 28th, she left Mr. Bryant's house around 4:00 p.m., returning at 10:00 p.m. When she got home Mr. Bryant was not there, and had not left any note as to where he had gone. (T, 9/4/02, 180-184). Ms. Davis fell asleep at approximately 11:00 p.m. She awoke around 5:00 a.m. when she heard the sounds of the police breaking a window as they were forcibly entering the house to execute the search warrant. (T, 9/4/02, 189). Ms. Davis did not hear any sounds of gunfire during the early morning hours of April 29th. (T, 9/4/02, 209-212). At the point she woke up that morning, she had not seen Mr. Bryant since the prior afternoon. According to the witness, Mr. Bryant's common practice was to come upstairs and wake her upon his arrival home. (T, 9/4/02, 214-215).

The officers searched the house, but did not find Mr. Bryant, any gun, any spent shell casings, any narcotics, nor any coat believed to belong to Mr. Covington. (T, 11/26/02, 58-59, 64-65).

Both parties stipulated that the hole in the rear door was measured to be 42 inches above the ground. (T, 11/26/02, 138). According to the medical examiner who conducted the autopsy, Mr. Covington's gunshot wound had a downward path, entered his chest at 47.25 inches from the ground, and exited his back at 44.75 inches from the ground. (T, 11/25/02, 137-138, 143-145).

Mr. Bryant was arrested in March, 2002, in San Bernardino, California, at which point he was extradited to Michigan. (T, 11/27/02, 13).

After two days of jury deliberations, the jury convicted Mr. Bryant of felony firearm, possession of firearm by a felon, and the lesser included offense of second-degree murder.

On direct appeal, the Michigan Court of Appeals affirmed the convictions, holding that admission of Mr. Covington's statements to the officers at the gas station did not violate the Sixth Amendment Confrontation Clause as they were not testimonial statements under this Court's opinion in *Crawford v. Washington*, 541 U.S. 36 (2004). The Michigan Supreme Court subsequently remanded the case to the Michigan Court of Appeals for reconsideration in light of this Court's decision in *Davis v. Washington*, 547 U.S. 813 (2006). On remand, the Michigan Court of Appeals again affirmed the convictions, continuing to find that the statements were non-testimonial. On leave granted, the Michigan Supreme Court reversed the decision of the Court of Appeals, holding that the statements were testimonial under *Crawford* and *Davis*, and that Mr. Bryant's confrontation right was violated as he had no opportunity to cross-examine Mr. Covington.

SUMMARY OF ARGUMENT

The definition of a statement obtained through police interrogation of a witness as testimonial, for the purposes of the Sixth Amendment Confrontation Clause, depends on the substantive content of that statement. Viewed from the perspective of the witness, a testimonial statement is one that provides a narrative of past events. Petitioner proposes that statements instead be characterized in relation to the situation in which the interrogation occurred, either where the alleged perpetrator is not in custody or the witness has suffered an injury, with that inquiry divorced from consideration of the content of the statement. Acceptance of that position would be an unwarranted expansion of the "ongoing emergency" standard this Court established in *Davis v. Washington*, 547 U.S. 813 (2006), for defining testimonial versus nontestimonial statements.

An "ongoing" emergency exists only where the statement is part of the event itself, referring to an immediate threat of harm. Expanding the confines of the ongoing emergency standard will lead to inconsistent rulings in the lower courts, and admission into evidence of out-of-court statements, not subjected to cross-examination, that are obvious substitutes for live testimony. The *Davis* standard, which determines the character of statements that are the product of interrogation through review of the objective content and circumstances of each particular statement, correctly enforces the protections of the Confrontation Clause. This Court should reject Petitioner's efforts to dilute that protection.

The evaluation of whether a statement involves a call for help during an ongoing emergency is not comparable to whether exigent circumstances exist for Fourth or Fifth Amendment situations. The characterization of a statement as testimonial or nontestimonial is solely a question of use of the statement at trial under the Confrontation Clause, and not an issue concerning the regulation of police conduct. The fact that a statement obtained by the police qualifies as testimonial will not preclude police reliance on that statement in further investigation of the alleged offense, nor should it cause the police to modify or limit their subsequent behavior.

Neither the fact that an alleged perpetrator of the offense is not in police custody at the time of the statement nor the fact that a declarant has been injured in the event creates a conclusive presumption that any statement obtained by the police under those circumstances is nontestimonial. This Court in *Davis* recognized that a statement which begins as nontestimonial, occurring during the criminal event as a call for police assistance to intercede in that event, can evolve into a testimonial statement if the event ends and the criminal behavior ceases, even if the perpetrator has not been taken into custody. The possibility that criminal behavior may recur in the future does not alter the character of a narrative of past events. Where the declarant does not express any imminent danger or fear of ongoing criminal conduct by the perpetrator, but instead confines the statement to a description of prior conduct, and no ongoing offense is evident from the objective circumstances of the interrogation, the statement is testimonial.

The existence of an injury to the witness similarly does not by definition create an "ongoing emergency" for the purposes of the Confrontation Clause. A statement that details past events is not primarily intended by the declarant as a call for medical assistance from an investigating police officer.

Definition of an "ongoing emergency" as criminal behavior occurring contemporaneously with the statement is consistent with the limitation on the admissibility of statements which existed under the res gestae doctrine at common law. Where a statement is part of an event, phrased in the present tense in relation to events occurring concurrently with the statement, that statement is not analogous to trial testimony. Witnesses do not go into court and declare an emergency, seeking immediate help. A narrative of past events is an obvious substitution for live testimony, and inherently testimonial.

The Michigan Supreme Court correctly held that the declarant's statement in this case was testimonial, and inadmissible in the absence of any opportunity for Mr. Bryant to cross-examine Mr. Covington. The statement referred only to events that had concluded 30 minutes prior to the interrogation, at a location away from where the statement was obtained. Mr. Covington never expressed a present fear or indicated that any immediate danger existed at the time and place of the statement. There was no objective evidence in the case that ongoing criminal conduct was occurring at the gas station, or that the alleged perpetrator was or had ever been at that location. Mr. Covington did not call for the police to intervene to stop on ongoing situation, but

instead confined his statements to a description of events that had already concluded in order to provide evidence the police could use in a potential prosecution. The conduct of the officers who conducted the interrogation objectively showed that they did not believe that they or Mr. Covington were in any imminent danger. The statement obtained in this case was the core of testimony that Mr. Covington likely would have given had he survived and testified at a trial. That statement was testimonial under the *Davis* standard, and was properly held inadmissible under the Sixth Amendment.

ARGUMENT

A statement obtained as a result of police interrogation is testimonial, for the purposes of the Confrontation Clause, where the declarant provides solely a narrative of past events and makes no plea for police assistance to meet a current threat, under circumstances where the alleged perpetrator is at large and/or the declarant has suffered an injury.

> And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.

Davis v. Washington, 547 U.S. at 822, fn. 1.

In *Davis*, *supra*, this Court established standards for when out-of-court statements from a non-testifying declarant in response to police interrogation are subject to the Confrontation Clause requirement of the Sixth Amendment.[3] The Court wrote:

> Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822.

In *Davis*, this Court correctly defined the term "ongoing emergency" to be limited to situations where the witness faces an immediate threat of harm and is seeking police intervention to negate that threat. The

---

3. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Amend VI.

determination of whether an "ongoing emergency" existed at the time of the statement must be conducted from the perspective of the witness, with primary focus on the content of the statement. Where a declarant recognizes the existence of an imminent threat and seeks the immediate assistance of the police, that declarant is not acting as would a witness giving testimony at a trial. If the declarant instead is providing a description of past events, the statement is a clear substitute for trial testimony, and must be subject to the requirement of an opportunity for confrontation. The *Davis* standard strikes the proper balance between these two situations, and provides a basis for consistent and predictable decisions in the lower courts.

In arguing to this Court for an expansive definition of the term "ongoing emergency," Petitioner seeks to shift the focus from an objective review of the content and circumstances of the declarant's statements to a subjective analysis of the intent of the interrogator's questioning. Petitioner proposes that this Court, contrary to both the language and the rulings in *Davis* and its companion case of *Hammon v. Indiana*, create a window of unspecified duration during which all statements obtained by the police are conclusively presumed to be non-testimonial, regardless of the actual content or objective circumstances of those statements. Acceptance of Petitioner's position would unjustifiably extend the test for an "ongoing emergency" far beyond this Court's explanation and application of that term in *Davis*.

Petitioner asserts that the "primary purpose" test should be redefined to mean that any time the police speak to a declarant when the perpetrator of the alleged crime has not yet been taken into custody and/or the declarant has been physically injured there is an "ongoing" emergency as of the time of the statement, and any statement obtained will by definition be nontestimonial. Neither the fact that the suspect is not in police custody at the time of the statement nor the existence of an injury to the declarant automatically creates an "ongoing" emergency exempting any statement obtained as a result of interrogation from the requirements of the Sixth Amendment. Petitioner's arguments misconstrue both this Court's decision in *Davis* and *Hammon*, and the fundamental nature of testimonial statements.

The first words of Petitioner's own statement of the issue presented in this case demonstrates the misplaced focus of the prosecution's position. When Petitioner writes that "Preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial . . ."[4] they fail to recognize that it is the statement by the declarant, and not the questions asked by the police, that must be evaluated for its status as testimonial or nontestimonial. It is the lack of any opportunity to cross-examine the declarant as to the credibility and reliability of the statement that is at the core of the Confrontation Clause issue. For that reason, the proper perspective in analyzing the character of the statement is from the point of view of the declarant – is the statement a cry for help during an ongoing offense, or a statement intended by the declarant to provide evidence to the police concerning a prior, completed crime?

---

4. Petitioner's Brief on the Merits, p. 6.

Davis did not hold that any "emergency," in the broadest definition of that term, would mandate a finding that statements obtained through police questioning were principally intended, regardless of the content of the statements, to assist the police in resolving that emergency. The Court qualified the term "emergency" with the requirement that it be "ongoing," and correctly applied that qualification, under the facts in *Davis* and *Hammon*, to conclude that the "ongoing emergency" is criminal conduct occurring contemporaneously with the statement.

A. Police conduct will not be impacted by a subsequent determination of whether a statement was testimonial under the Confrontation Clause.

Consideration of the proper definition of an "ongoing emergency" for Confrontation Clause purposes is not comparable to an analysis of exigent circumstances which may govern police behavior for Fourth or Fifth Amendment purposes. The fact that information received by police officers through a witness' narrative of past events may be relevant to a determination of the identity of an alleged perpetrator or further police investigation does not transform that narrative into a nontestimonial statement. Where the objective circumstances at the time of the statement show that the criminal event has ended, and there is no ongoing emergency that presents an immediate danger to the declarant or the police arising from continuing conduct by the perpetrator, any concern by the police that future criminal conduct might occur is subjective and conjectural. Certainly the police can and should, as they did in this case, use information received in a testimonial statement to further investigate an allegation and, if

appropriate, make an arrest. This Court recognized, however, that the Confrontation Clause issue raised by the admission of the statement is solely a matter of evidentiary use of that statement at trial, and not any restriction on police behavior:

> Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it so. * * * But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

547 U.S. at 832, n. 6.

The characterization of a statement obtained by the police during the questioning of a witness as either testimonial or nontestimonial will not influence an officer's decision on how to proceed. Where this Court has adopted hot pursuit or public safety exceptions to the warrant requirement,[5] or to the *Miranda* warnings requirement during a custodial interrogation,[6] those decisions instruct police officers on when they can take

---

5. *Warden v. Hayden*, 387 U.S. 294 (1967); *United States v. Santana*, 427 U.S. 38 (1976).

6. *New York v. Quarles*, 467 U.S. 649 (1984).

immediate action in response to the exigency which does not jeopardize the admissibility of any evidence they obtain. Police officers in those situations must make an on-the-spot decision to conform their conduct to the nature and scope of the exigency.

In a Sixth Amendment situation, however, any issue as to the admissibility of the statement will not arise, if ever, until after the police conduct, if and when the declarant becomes unavailable for cross-examination:

> The Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision.

547 U.S. at 832, n. 6. Since officers who obtain a statement cannot know at that time whether the declarant will testify and be subject to cross-examination in the future, they have no basis on which to restrict or modify their further investigation of the allegation. The admissibility of the statement at trial will not depend on the conduct of the officers after eliciting the statement. There is no disincentive for them to rely upon the statement in their subsequent investigation. Officers will not decide against interviewing victims or witnesses out of a concern that the statements they obtain will subsequently be found inadmissible, on Confrontation Clause grounds, at trial.

The officers in this case acted properly and professionally in gathering evidence of an alleged criminal offense, and then acting on that evidence. The inadmissibility of evidence from a third party as to a

testimonial statement of an unavailable declarant is not premised on application of the exclusionary rule relevant to Fourth and Fifth Amendment violations, or on any claim of police misconduct. Instead, the evidence is inadmissible solely due to the absence of any opportunity to employ "the only indicium of reliability sufficient to satisfy constitutional demands * * * confrontation." *Crawford*, 541 U.S. at 69.

B. The fact that an alleged offender is not in police custody at the time the statement is obtained does not, standing alone, render the statement nontestimonial.

Statements obtained as a result of interrogation are not characterized as testimonial only if they are given at a time when the alleged perpetrator is in the physical custody or control of the police. If the perpetrator is at large, but the objective circumstances show that there is no immediate or contemporaneous threat to the declarant, no ongoing emergency exists at the point the statement is elicited. In *Davis*, this Court recognized that a statement can be testimonial despite the fact the perpetrator has yet to be located or arrested. Conjecture over the possibility of future harm cannot transform the content of a statement in which the declarant speaks only of past events.

Crawford v. Washington, *supra*, held the Sixth Amendment right to confrontation is violated where an out-of-court testimonial statement is admitted into evidence, even if that statement otherwise falls within a firmly rooted hearsay exception under state law, if the accused has not had an opportunity to cross-examine

the declarant. The Court distinguished, for the purposes of the Sixth Amendment guarantee, a "testimonial" statement from a more casual statement made to a friend or stranger:

> "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."

541 U.S. at 51. (Citation omitted). The Court held that "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." 541 U.S. at 52-53.

In applying the intent of the framers to the facts in *Crawford*, the Court held the state court erred in holding the evidence admissible even though it fit within a firmly established exception:

> Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. * * * Where testimonial statements are at issue, the only indicium of

> reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

541 U.S. at 68-69. (Footnote omitted).

In *Davis*, the Court contrasted two differing factual situations involving statements made by witnesses to police officers or law enforcement officials. In the *Davis* case, the statements were made during a 911 call to an emergency operator. Those statements related to a domestic violence situation that was actively occurring at the time the 911 call was initiated. In the companion case, *Hammon v. Indiana*, the statements at issue were made to police officers who were investigating a domestic violence situation. These statements were made to officers when they arrived at the scene, and after the complainant was separated from her husband (the defendant in the subsequent prosecution) and questioned by an officer as to what had occurred at the house prior to the arrival of the police.

This Court compared the objective circumstances of these two statements. The Court's articulation of its rulings demonstrates that the content of a statement is critical to the determination of whether that statement is testimonial, and thus subject to the *Crawford* constitutional requirements.

The *Davis* majority held that the initial statements made to the 911 operator in Davis were nontestimonial. They were made during and referred to an ongoing emergency – the alleged assault by Mr. Davis on the declarant. The Court held the primary purpose of the

interrogation was to allow the police to immediately intercede to alleviate that emergency. The statement made to the investigating officer in Hammon was held to be testimonial, and inadmissible even if it qualified under Indiana evidentiary law as an excited utterance. That statement was made after the emergency situation – the alleged assault by Mr. Hammon on his wife – had ended. The primary purpose of that police questioning was to gather evidence for a possible future prosecution. This Court noted that statements, whether written or oral, made to police officers who are investigating a past crime clearly meet the test of "testimonial" statements:

> When we said in *Crawford*, *supra*, at 53, 124 S. Ct. 1354, 158 L. Ed. 2d. 177, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"

547 U.S. at 826.

Considering the factual situation in *Hammon*, this Court held it was "entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct." 547 U.S. at 829. This Court noted that the declarant had been separated from the defendant by the police, that there were no ongoing violent acts at the point the police arrived and spoke to the declarant, and that the declarant made no assertion of any immediate threat of harm. While the Court recognized that the interrogation in *Hammon*, occurring in the complainant's living room, was less formal than the *Mirandized* custodial interrogation at a police station which occurred in *Crawford*, that factual difference did not predetermine the primary purpose of the interrogation:

> It is true that the *Crawford* interrogation was more formal. * * * While these features certainly strengthened the statements' testimonial aspect – made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events – none was essential to the point. It was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigation."

547 U.S. at 830.

This Court held in *Davis* that statements made to investigating police officers are sufficiently solemn and formal, for the purposes of the Confrontation Clause, because the witness should be aware that giving a false

statement to the police is itself criminal. 547 U.S. at 826-827. "It imports sufficient formality, in our view, that lies to such officers are criminal offenses." 547 U.S. at 830, n. 5.

The fact that the statements at issue in *Hammon* were taken at or near the alleged crime scene, by initial responders to that scene, did not implicitly render them nontestimonial:

> But in cases like this one, where Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were "initial inquiries" is immaterial.

547 U.S. at 832.

Petitioner's assertion that having an alleged dangerous perpetrator at large will constitute an "ongoing" emergency, defining the responses to all initial inquiries as nontestimonial, cannot be squared with the holdings in *Davis*. This Court expressly rejected the similar position taken by the Indiana Supreme Court in *Hammon* that "virtually all 'initial inquiries' at the crime scene will not be testimonial.'" 547 U.S. at 832.

This Court's discussion of the objective circumstances in *Davis* is enlightening on this point. In *Davis*, as in this case, the alleged perpetrator was not in police custody or under police control when the statement was obtained. This Court noted that it was

only the initial portion of the 911 call from the declarant that was at issue in the case. 547 U.S. at 829. In that initial portion, the declarant (Ms. McCottry) identified Mr. Davis as the person who was in the process of assaulting her. 547 U.S. at 817. The Court held that initial portion of the 911 call was a cry for help that the police intercede in that ongoing emergency:

> In *Davis*, McCottry was speaking about event as they were actually happening, rather than "describing past events." . . . Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against a bona fide physical threat.

547 U.S. at 827. (Citation omitted).

But this Court went on to recognize that part way through the 911 call, Ms. McCottry informed the operator that Mr. Davis had ceased assaulting her and had driven away from the scene. 547 U.S. at 818. At that point of the call, the operator asked a series of questions to Ms. McCottry, focusing on the prior events and the identification of Mr. Davis, and advised the declarant that the police would be coming to speak to her after they first went to "check the area for him." *Id.* at 818.

While finding that the initial statements during the call, occurring while the alleged assault was in progress, were nontestimonial, this Court wrote "it could be readily maintained" that the later statements, occurring after Mr. Davis left the scene, were testimonial. 547 U.S. at 828. The Court recognized that a statement which

begins as a nontestimonial call for assistance during a current, ongoing emergency can evolve into a testimonial statement concerning past events if that emergency ends during the statement. Specifically under the facts of the case, this Court noted the emergency "appears to have ended (when Davis drove away from the premises)." *Id.* at 828. The Court wrote that where the status of a statement changes in the midst of the statement, given a change in the objective circumstances, trial judges will be able to "recognize the point at which, for Sixth Amendment purposes, statements in response to interrogation become testimonial." *Id.* at 829. See *New York v. Quarles*, 467 U.S. 649, 658-659 (1984). Based on that recognition, trial judges can redact or edit statements so that only those portions which qualify as nontestimonial are admitted before a jury if the declarant has not been subject to cross-examination.

Although the Court in *Davis* was not asked to determine whether the later portions of the 911 call, after Mr. Davis left the scene, were testimonial, application of that discussion to this Petitioner's asserted test for an "ongoing emergency" is instructive. Petitioner argues that where an allegedly assaultive perpetrator is not in custody at the time the statement is obtained, that perpetrator by definition presents a sufficient threat to the future safety of the declarant and/or the investigating officers to constitute an "ongoing emergency" for Sixth Amendment purposes. That argument is directly contrary to this Court's language in *Davis*. In that case, the alleged perpetrator was at large during the entire 911 call. While Ms. McCottry told the operator that Mr. Davis had driven

away from the scene, the possibility clearly existed that he could have returned to the scene and renewed the assault before the police could arrive to protect her, that he could have returned and attacked the police once they arrived, or he could have threatened bystanders or other persons. Under Petitioner's proposed definition of "ongoing emergencies," every portion of the 911 call would have been nontestimonial on the grounds that Mr. Davis constituted a threat of future harm as long as he was at large. This Court's discussion in *Davis* must be construed as implicitly rejecting that interpretation of the test, and instead recognizing that an "ongoing emergency" is confined to actual criminal behavior or threats that are occurring at the time of the statement, and not to the potential of future events.

In *Davis*, the accused asserted that Ms. McCottry, in the initial portion of the 911 call, was in the role of a testimonial witness under English common law. This Court rejected that argument, citing the opinion in *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779). In *Brasier*, a young rape victim related the circumstances of the offense to her mother "immediately" upon returning home. 547 U.S. at 828. This Court wrote that this decision would have supported Mr. Davis' argument only if the statement instead had been the girl's cry for help while being chased by the offender, but under the facts of the case "by the time the victim got home, her story was an account of past events." 547 U.S. at 828. The statement at issue in *Brasier* was given to the declarant's mother shortly after the alleged offense, while the offender was at large. The potential that the offender posed a risk of future harm to the declarant or others did not transform what was otherwise a

testimonial statement to one primarily relevant to resolving an ongoing emergency. The *Brasier* opinion supports the rulings this Court made in *Davis*, the Michigan Supreme Court made in this case, and the rulings of other courts interpreting the *Davis* standard[7] that nontestimonial statements are those made concurrently with the events which comprise the offense, and not those describing those events made after the events have ended.

In this case, the out-of-court statements of Anthony Covington met the *Crawford* and *Davis* tests for testimonial statements, as they were made with a primary purpose of providing evidence relevant to past criminal behavior. The statements that he had been shot 30 minutes prior to the questioning, at an address six blocks away, and that "Rick" was the person who shot him, were direct responses by Mr. Covington to police questions meant to compile evidence of a completed crime. At no point in his statements did Mr. Covington express any present fear of an additional assault, ask the police to intervene to prevent any future offense, or allege that "Rick" presented a current threat to any other person. The trial court record reveals no exigent circumstances, nor any immediate danger to Mr. Covington, when the police arrived at the gas station and questioned the declarant. Mr. Covington was no longer at the scene of the shooting, and the police saw

---

7. See *Hayward v. State*, 24 So. 3d 17 (Fla. 2009); *State ex rel J.A.*, 195 N.J. 324; 949 A.2d 970 (2008); *State v. Lewis*, 235 S.W. 3d 136 (Tenn., 2007); *State v. Kirby*, 280 Conn. 361; 908 A. 2d 506 (2006); *State v. Mechling*, 633 S.E. 2d 311 (W. Vir., 2006); *Raile v. People*, 148 P. 3d 126 (Colo., 2006).

no indication of any ongoing violent acts. Mr. Covington's statements to the police were not made in order to enable the police to immediately intercede and stop a crime as it was occurring, but rather were answers that were limited to providing evidence as to the identity of the offender and the circumstances of a past incident. The statements were directly comparable to the statements at issue in *Hammon*, within the scope of the term "testimonial." The absence of confrontation rendered these out-of-court statements constitutionally inadmissible. *Crawford*, *supra*; *Davis*, *supra*.

In *Hammon*, this Court noted that when the police arrived at the scene, there "was no emergency in progress" as the police did not witness any violent or assaultive acts, nor even any harsh words between Ms. Hammon and her husband. 547 U.S. at 829. In this case, when the officers arrived at the gas station, there similarly was no criminal conduct occurring. No shots were being fired, no one was seen in possession of a firearm, nor were any witnesses seen cowering in fear or running from the scene. The Michigan Supreme Court correctly concluded that the objective circumstances showed that there was no ongoing criminal event at the gas station. There was no evidence presented that the police were informed or believed that the shooting took place at the gas station. The record is undisputed that upon arrival at the gas station, none of the five officers took any affirmative steps to question the bystanders as to whether the perpetrator of the reported shooting was present at the scene, made any search of the immediate area, nor pulled their weapons. Sgt. Wenturine, the supervising officer on the scene, never ordered any of his subordinate officers to

investigate if they and/or Mr. Covington were then in danger from a shooter while he was questioning Mr. Covington. Although two of the officers did testify to a general concern that the perpetrator might be in the area, neither did anything to either confirm or dispel that apprehension. Instead, all five officers, collectively and individually, went immediately to Mr. Covington to question him about what had happened to him.

Contrary to Petitioner's and *amici*'s unsupported assumptions, none of the officers posed any questions to Mr. Covington about whether "Rick" was then present at the gas station, had ever been at the gas station, or about "Rick's" current location or intent. Mr. Covington's responses to the officers' questions never asserted that he was in immediate fear or danger from "Rick" continuing an assault on him, nor referenced "Rick's" whereabouts or conduct subsequent to the shooting. Nothing about the direct or circumstantial evidence of the objective circumstances of his responses supports a conclusion that either Mr. Covington or the police believed that the criminal event was "ongoing" at the time of the statements.

This Court's test from *Davis* requires that the "primary" purpose of the specific interrogation be viewed in the context of the objective circumstances. That standard recognizes an interrogation can have multiple purposes, but that the role of a reviewing court, under the objective facts of each case, is to determine which of those purposes was primary. Had Mr. Covington believed that he was in danger of a renewed assault by "Rick," he would have expressed that fear and need for immediate assistance to the officers, as Ms. McCottry

did when she first spoke to the operator in *Davis*. Had the police in this case considered the primary purpose of questioning Mr. Covington to be, as Petitioner asserts, to enable them to meet an ongoing emergency, it is inconceivable that not one of these officers would have asked Mr. Covington if "Rick" was present at the gas station or about the perpetrator's current location or plans. To the contrary, the objective circumstances fully support the Michigan Supreme Court's conclusion that the officers were not told nor did they suspect that they or Mr. Covington were in any immediate danger, or that there were any criminal acts ongoing at the gas station. The "primary" purpose of the repeated questioning was to discover what happened to the declarant during the past events, in order to develop that evidence for use in potential prosecution of the assailant. The fact that the officers learned information during the questioning that assisted them in investigating the offense and attempting to locate the perpetrator did not create an ongoing emergency where none in fact existed:

> Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it so.

547 U.S. at 832, n. 6.

Petitioner and *amici* supporting Petitioner's argument seek to "make it so" by arguing for a conclusive presumption that an ongoing emergency exists whenever the police initially respond to the report

of a serious or violent crime. Petitioner does not suggest any limits on the duration of the period during which all police interrogations will produce, regardless of their content, nontestimonial statements. Inconsistent and unpredictable results will flow from the lack of any definitive limitation on how long this purported "ongoing" emergency lasts. The Michigan Supreme Court correctly observed that acceptance of Petitioner's argument could mean that all statements taken by the police prior to the apprehension of the suspect would be nontestimonial. This Court in *Davis* rejected that broad a definition of an ongoing emergency. Where, as here, the totality of the declarant's statements were confined to the circumstances of past, completed events, did not reference any current situation involving the alleged suspect, and the police conduct reflected that they did not fear for the immediate safety of themselves or the declarant, these objective circumstances show that the statement was a testimonial narrative describing a prior crime.

C. The medical emergency to the declarant did not fall within the Davis definition of an ongoing emergency.

Petitioner alternatively asserts that the existence of an injury to a declarant sufficiently constitutes an "ongoing emergency" within the confines of the *Davis* decision. Nothing in the *Davis* opinion supports an expansion of the term to a medical or health situation rather than an ongoing criminal event. While it cannot be disputed that a serious or life-threatening injury creates a medical emergency for a victim, the *Davis*

Court did not base its decision on the presence or absence of any injury to the declarant. To the contrary, the Court noted that in her statement, Ms. Hammon told the police that during the prior assault her husband had thrown her down and shoved her head into broken glass, and had punched her twice in the chest. 547 U.S. at 821. This Court did not conclude that her statement was nontestimonial because the police may have discovered that she was injured during the assault, or received information relevant to medical care. The "emergency" crucial to the determination of the admissibility of the statement was the criminal conduct at issue, and whether it was occurring as the statement was being made (ongoing) or had already ceased. Other emergencies, either medical situations or the potential of new events in the future, do not change the character of a narrative of past events. Had this Court concluded that the existence of an injury, standing alone, was sufficient to render nontestimonial any statement made by the injured declarant in response to police interrogation concerning the cause of the injury, it is likely the Court would have applied or discussed that conclusion in relation to the likelihood that Ms. McCottry and/or Ms. Hammon were injured during the domestic assaults.

The record of this case reflects that the primary purpose was to provide evidence of past events rather than intercede in a current medical situation. At no point did Mr. Covington ask the officers to treat or assess his injury. The officers asked few questions of Mr. Covington concerning that injury, and did not render any medical assistance or basic first aid. While it is unlikely that they were insensitive to his wound, they knew that expert

medical care had already been dispatched to the gas station and would arrive within moments. These officers were not on the scene to provide medical assistance to an injured man. They were there to investigate and gather evidence of a reported crime. Their questions to Mr. Covington concerning where and when he had been shot, and the circumstances of that shooting, were not intended to provide information that they would then use to decide on the degree of medical care he required.

These officers did not "assess a party's injuries to determine whether immediate medical attention is necessary and whether additional assistance will be needed from paramedics." Petitioner's Brief at 14. They knew paramedics would soon arrive and would be significantly more qualified to assess and treat Mr. Covington's medical situation. In the short amount of time they had prior to the arrival of the EMS unit, all five officers sought to obtain as much information as they could from Mr. Covington about the past events, anticipating that he would soon be transported to a hospital. Under the *Davis* standard, their primary purpose in questioning Mr. Covington, on these objective and specific facts, was to "establish or prove past events potentially relevant to later criminal prosecution."

D. A definition of nontestimonial statements for purposes of the Confrontation Clause as those made during and part of the events at issue is consistent with the common law doctrine of res gestae statements.

The decisions in *Davis* and *Hammon* are consistent with the "res gestae" doctrine of admissible statements which has been discussed in both English and United States common law decisions, including the ruling in *Brasier, supra*. See Fisher, *What Happened – And What Is Happening – To The Confrontation Clause*, 15 J. L. Poly. 587 (2007). Under this doctrine, a statement made during the event itself was deemed to be part of the event, and therefore admissible, but a statement made after the cessation of the event which described or related that prior event was held inadmissible as falling outside of the res gestae of the offense. See also Friedman and McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171 (2002).

For example, in *People v. Wong Ark*, 30 P. 1115 (1892), the California Supreme Court held that a statement made to a police officer by the victim of a shooting only moments after the event, identifying the defendant as the person who fired the shot, was inadmissible at trial since the victim died as a result of the shooting and never testified in person. The Court held that "narrative[s] of past events, made after the events are closed," are not part of the res gestae, and the statement was inadmissible, even though the assailant escaped the scene of the shooting, because "[t]he declaration was not the fact talking through the party, but the party's talk about the facts." 30 P. at 1115-1116.

This Court's holdings in *Davis* and *Hammon* are in harmony with the res gestae doctrine, which relies on the temporal circumstances of the statement. Ms. McCottry's initial statements to the 911 operator were made during the actual assault itself, and were thus part of the res gestae. Ms. Hammon's statement was made after the event had concluded, and was a narrative of past events rather than part of the incident itself. In this case, it is undisputed that the shooting of Mr. Covington did not occur at the gas station, where the statement was obtained, and had concluded approximately 30 minutes prior to the police questioning of the declarant.

This definition of an "ongoing emergency," consistent with the res gestae theory, explains the significance the Michigan Supreme Court gave to the substantive content and verb tense of the statement and police questions in this case. Petitioner asserts that "focusing myopically on whether the interrogation or statements use the past or present tense" is an incorrect means of determining the primary purpose of the interrogation.[8] Viewed in context to the history of the res gestae doctrine and this Court's decision in *Davis*, analysis of the content is essential to determine whether the statement is part of the event or a description of past events. Here, where all five of the officers who questioned Mr. Covington acknowledged that his statements in response to their questions referred only to what happened to him 30 minutes earlier, at a location six blocks away, his statements were a narrative of events that had concluded, and not a cry for assistance for the

8. Petitioner's Brief on the Merits, p. 13.

police to intercede in events that were occurring concurrently with the interrogation. The statements were not part of the event. This Court in *Davis* made this point explicit when it noted the difference between the questions posed to Amy Hammon and those initially asked by the 911 operator of Ms. McCottry:

> When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in Davis) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime – which is, of course, precisely what the officer should have done.

547 U.S. at 830.

Where an out-of-court statement is the functional equivalent to in-court testimony, and where it would have been anticipated at the time the statement was made that the substance of the statement would be relevant evidence in a criminal prosecution, the statement can only be admitted at a trial, if the declarant later proves unavailable, where the Sixth Amendment right to confrontation has been satisfied. In this case, the statement given by Mr. Covington in response to the police questions was the core of the testimony he presumably would have given at trial had he survived his wound:

> Both statements [the statements at issue in *Crawford* and *Hammon*, supra] deliberately

> recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitution for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial.

547 U.S. at 830. Similarly, the *Davis* Court noted that the statement in *Crawford*, as well as the evidence at issue in *United States v. Inadi*, 475 U.S. 387 (1986); *Raleigh's Case*, 2 How. St. Tr. 1 (1603); and *King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791), "aligned perfectly with their courtroom analogues." 547 U.S. at 828.

Where a statement is nontestimonial in that it is part of the events as they are happening, the statement does not match up with any anticipated testimony if the declarant later appears at a trial. Ms. McCottry's statement to the 911 operator that Mr. Davis was assaulting her would not have been repeated at trial, as no assault would have been occurring during the trial. "[N]o 'witness' goes into court to proclaim an emergency and seek help." 547 U.S. at 828. No portion of the statement Mr. Covington gave to the officers in this case compares to the initial statements of Ms. McCottry in *Davis*. His statement was an "obvious substitution" for live testimony, and inherently testimonial.

E. Mr. Bryant was prejudiced by the lack of opportunity to confront Mr. Covington's statements to the police.

The circumstances of the case show, as they did in *Crawford*, why confrontation would have been crucial in the case. Mr. Covington alleged to the police that he could recognize "Rick's" voice through the door, and thus assumed "Rick" shot him, but was unable to provide the police with a last name or a physical description of "Rick" which matched Mr. Bryant. Mr. Covington's brother testified that the declarant knew Mr. Bryant's full name, and thus should have readily been able to provide the police his last name and an accurate description if the "Rick" Mr. Covington referred to in his statements was in fact Mr. Bryant. Cross-examination would have delved deeply into these ambiguities in the statements, and could have revealed that Mr. Covington was referring to a different "Rick" than Richard Bryant. Given the weaknesses of the prosecution's circumstantial evidence, the lack of any opportunity for the defense to cross-examine the declarant as to the reliability of his purported identification of Mr. Bryant as the offender created prejudicial error of constitutional dimension.

The admission of the out-of-court statements of Mr. Covington violated Mr. Bryant's Sixth Amendment right to confrontation. The statements were testimonial in nature, and were never subjected to the "only indicium of reliability sufficient to satisfy" the demands of the Constitution – the right of cross-examination. The Michigan Supreme Court correctly interpreted and applied this Court's rulings in *Crawford* and *Davis*. This Court should affirm that decision.

CONCLUSION

Respondent asks this Court to affirm the decision of the Michigan Supreme Court.

Respectfully submitted,

PETER JON VAN HOEK
Assistant Defender
STATE APPELLATE DEFENDER OFFICE
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833
Peter@sado.org

Attorney for Respondent

REPLY BRIEF

Supreme Court, U S
FILED
JUL 15 2010
CLERK

No. 09-150

In The
Supreme Court of the United States

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs

RICHARD PERRY BRYANT,

Respondent

On Writ Of Certiorari To The Michigan Supreme Court

PETITIONER'S REPLY BRIEF

KYM L WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A BAUGHMAN
Chief of Research, Training, and Appeals

LORI BAUGHMAN PALMER*
Assistant Prosecuting Attorney
11th Floor, 1441 St Antoine
Detroit, Michigan 48226
(313) 224-2698
lpalmer@co wayne mi us

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225 6964
OR CALL COLLECT (402) 342 2831

ARGUMENT

Petitioner asks this Court to apply the test set forth in *Davis v. Washington*.[1] There is no need to expand its terms, but there is a need to clarify that those terms should not be ignored, substituted, or artificially limited. The objective standard specified in *Davis* provides a workable standard for determining whether the primary purpose of the interrogation was to enable police to meet an ongoing emergency. There is no need to replace this standard with a subjective standard, which would create additional uncertainty and require greater speculation by the courts. Similarly, the language used in the *Davis* test should be respected. The Court chose the term "ongoing emergency," not "ongoing criminal event," and nothing in the language of the opinion limits the word "emergency" to "criminal conduct." To so hold unnecessarily rewrites the test in *Davis*. Finally, the common-law development of the res-gestae doctrine does not support defendant's proposed bright-line temporal rule, as the historical application of the doctrine varied and the rule itself developed as an aspect of the hearsay rule, not the right of confrontation.

---

[1] *Davis v. Washington*, 547 U.S. 813, 822 (2006).

I. The objective "primary purpose" test set forth in *Davis* should not be abandoned in favor of a subjective test focused solely on the declarant.

Respondent begins by quoting the test set forth in *Davis v. Washington*:

> Statements are nontestimonial when made in the course of police interrogation under circumstances *objectively* indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances *objectively* indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[2]

Respondent next asserts, however, that the determination whether an "ongoing emergency" existed "must be conducted from the perspective of the witness," and that the "proper perspective in analyzing the character of the statement is from the point of view of the declarant."[3] Such a shift to a subjective, witness-focused inquiry would be a radical departure from the *Davis* test, which focuses on the primary purpose of the interrogation as indicated by the objective circumstances

---

[2] Respondent's Brief on the Merits, p 11, *Davis, supra*, 547 U S at 822 (emphasis added)

[3] Respondent's Brief on the Merits, pp 12, 13

Further, Respondent's proposed standard would inject additional uncertainty into the determination whether an ongoing emergency existed, as courts would be tasked with determining the subjective perspective of a witness who is no longer available, and possibly no longer alive. Requiring courts to step into the shoes (and minds) of declarants is unnecessary and unwieldy. *Davis*'s focus on the primary purpose of the interrogation as objectively indicated by the circumstances better equips courts to determine whether statements are testimonial or nontestimonial – this Court should not jettison the *Davis* test in favor of a subjective standard focused solely on the declarant.

II. Nothing in the *Davis* opinion limits the term "emergency" to criminal events.

The Court in *Davis* stated clearly that statements made under circumstances objectively indicating that the primary purpose of the interrogation was to enable police to meet an ongoing *emergency* were nontestimonial.[4] Respondent argues that the term "emergency" should be limited to "actual criminal behavior or threats," replacing the term "ongoing emergency" with "ongoing criminal event."[5] To so hold effectively rewrites the test set forth in *Davis*. Had the Court in *Davis* wished to refer only to ongoing

---

[4] *Davis, supra*, 547 U.S. at 822.

[5] Respondent's Brief on the Merits, pp. 25, 27.

criminal events, it would have said exactly that. Instead, the Court chose the word "emergency," with no accompanying language limiting that term to criminal behavior or threats occurring at the exact time of the statement. Similarly, nothing in the *Davis* opinion limits the term "emergency" to a criminal event – it is hardly an expansion of the term "emergency" to include medical emergencies within its definition.

III. The res-gestae doctrine does not support Respondent's proposed temporal rule.

Finally, Respondent argues that the bright-line temporal rule he urges is consistent with the common-law doctrine of res-gestae.[6] He relies in particular on *People v. Wong Ark*, which held that a shooting victim's identification of her assailant shortly after the shooting occurred was not admissible as res-gestae – that is, as part of the description of the event itself.[7] But as the *Wong Ark* court itself acknowledged, there was no settled historical understanding that the res-gestae rule properly excluded such evidence.[8] In other cases, courts viewed the res-gestae rule as extending to statements made immediately or

---

[6] Respondent's Brief on the Merits, pp. 33-36.

[7] *People v. Wong Ark*, 30 P. 1115 (Cal. 1892).

[8] *Wong Ark*, 30 P. at 127, 133.

very shortly after the event described.[9] And in any event, as its application in civil cases such as *Mosley* confirms, the res-gestae rule developed as an aspect of the hearsay rule, not as an aspect of the right of confrontation. This Court has made clear that the hearsay rule and the confrontation right are not co-extensive.[10] The equivocal common-law development of the res-gestae rule, therefore, provides no support for the rule Respondent proposes.

---

[9] See, *e g , Rex v Foster*, 6 Car & P 325, 172 Eng Rep 1261 (1834), *Commonwealth v M'Pike*, 57 Mass (3 Cush) 181, 184 (1849), *Insurance Co v Mosley*, 75 U S (8 Wall) 397 (1869)

[10] See *Crawford v Washington*, 541 U S 36, 51 (2004) ("[N]ot all hearsay implicates the Sixth Amendment's core concerns An off-hand remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them ")

CONCLUSION

Wherefore, Petitioner respectfully requests that this Court reverse the Michigan Supreme Court.

Respectfully submitted,

KYM L. WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals

LORI BAUGHMAN PALMER*
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
(313) 224-2698
lpalmer@co.wayne.mi.us

**Counsel of Record*

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAY 6 - 2010
OFFICE OF THE CLERK

No. 09-150

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

RICHARD PERRY BRYANT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LEONDRA R. KRUGER
Assistant to the Solicitor General
DAVID E. HOLLAR
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

891

QUESTION PRESENTED

Whether a shooting victim's statements identifying and describing his assailant and the circumstances of the shooting in response to police officers' initial on-the-scene questioning are "testimonial" within the meaning of *Crawford* v. *Washington*, 541 U.S. 36 (2004).

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 7
Argument:
The Confrontation Clause does not bar admission of a shooting victim's responses to police officers' initial on-the-scene questioning 9
A. Statements responding to emergency questioning are not testimonial under *Crawford* 10
B. Covington's statements were the product of police questioning primarily designed to respond to an ongoing emergency and were therefore nontestimonial 14
C. The Michigan Supreme Court erred in concluding Covington's statements were inadmissible under the Confrontation Clause 17
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Commonwealth v. *M'Pike*, 57 Mass. (3 Cush.) 181 (1849) 18
Crawford v. *Washington*, 541 U.S. 36 (2004) ..... *passim*
Davis v. *Washington*, 547 U.S. 813 (2006) ..... *passim*
Giles v. *California*, 128 S. Ct. 2678 (2008) 12, 17
Hiibel v. *Sixth Judicial Dist. Ct.*, 542 U.S. 177 (2004) ... 14
Insurance Co. v. *Mosley*, 75 U.S. (8 Wall.) 397 (1869) ... 18
King v. *Dingler*, 168 Eng. Rep. 383 (1791) 15

Cases—Continued Page

Melendez-Diaz v. *Massachusetts*, 129 S. Ct. 2527 (2009) 16
Raleigh's Case, 2 How. St. Tr. 1 (Eng. 1603) 10
Rex v. *Foster*, 172 Eng. Rep. 1261 (1834) 18
Thompson v. *Trevanion*, 90 Eng. Rep. 179 (K.B. 1694) 18
United States v. *Inadi*, 475 U.S. 394 (1986) 15

Constitution, statute and rule:

U.S. Const. Amend. VI 1, 7, 9, 12, 17
Confrontation Clause ..... *passim*
1 & 2 Phil. & M., c. 13 (Eng. 1554) 10
Mich. R. Evid. 803(2) 3

Miscellaneous:

James Fitzjames Stephen, *A History of the Criminal Law of England* (1883) 10
2 Noah Webster, *An American Dictionary of the English Language* (1828) 11

In the Supreme Court of the United States

No. 09-150

STATE OF MICHIGAN, PETITIONER

v.

RICHARD PERRY BRYANT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the rule under the Confrontation Clause of the Sixth Amendment barring the admission of the "testimonial" statements of witnesses who are unavailable for cross-examination at trial and were not previously subject to cross-examination, see *Crawford* v. *Washington*, 541 U.S. 36 (2004), applies to statements made by a shooting victim in response to police officers' initial on-the-scene questioning. Because that question has substantial implications for the conduct of federal criminal trials, the United States has a significant interest in the Court's disposition of this case.

STATEMENT

1. On the evening of April 28, 2001, Anthony Covington told his brother that he was going to the home of a man named Rick to attempt to retrieve an expensive coat Covington had previously traded to Rick for drugs. Covington lived down the street from Rick and had been buying cocaine from Rick for about three years. According to Covington's brother, Rick sold drugs to Covington from his back door. Pet. App. 2A, 9A.

The next morning at about 3:25 a.m., officers of the Detroit Police Department were dispatched to a gas station to respond to a report that a man had been shot. Pet. App. 9A. When the officers arrived at the location, they found Covington lying next to his car on the driver's side of the vehicle, between the gas pumps and the front door of the station. *Ibid.*; J.A. 7, 34-35, 42-43, 80, 100, 150. Covington was bleeding from an apparent gunshot wound, clutching his abdomen, and apparently in considerable pain. J.A. 8, 11, 35, 38-39, 75, 83, 101. After asking his name, the officers asked Covington what had happened. J.A. 18, 21-22, 36, 101-102. In response to the officers' questions, Covington stated that he had been shot by a man named Rick around 3 a.m. through the back door of Rick's house. After he was shot, he had driven himself to the gas station. Pet. App. 9A; J.A. 12-13, 21-24, 37-40, 76, 78, 102, 126-128. Covington told the officers that he did not know Rick's last name, but provided a physical description. Pet. App. 9A; J.A. 84-86, 103, 114-115, 133-135. He also described the location of the shooting, which was approximately six blocks from the gas station. J.A. 59-60, 102-103.

Covington spoke to the officers slowly and in a low voice and appeared to have difficulty breathing. J.A. 18-19, 38, 57-58, 75, 83, 111-112, 126. About five to ten min-

utes after the officers responded to the call, paramedics arrived and the officers' questions ceased. J.A. 40-41, 116-117, 138. Covington died from his wounds at a hospital a few hours later. Pet. App. 1A, 10A.

Shortly after the paramedics arrived, three of the officers went to the location Covington had described. Pet. App. 1A, 10A. They found Covington's wallet and identification outside, a bullet hole in the back door, and a bullet and blood on the porch. *Ibid.* Respondent's girlfriend and his three children were inside. *Id.* at 1A-2A, 10A. Respondent's girlfriend testified at trial that she and respondent had been living at the house for several months and that respondent had been at the house earlier that evening. *Id.* at 2A, 10A. She also testified that she did not see respondent after that night. *Id.* at 2A.

Respondent was arrested a year later in California. Pet. App. 2A, 10A. He was extradited to Michigan, where he was charged with first-degree murder, possession of a firearm by a felon, and possession of a firearm during commission of a felony. *Ibid.*

2. At trial, the State introduced the testimony of the officers who responded to the police dispatch, each of whom described the conversation with Covington at the gas station. *E.g.*, J.A. 74-96, 98-123, 125-146. The court admitted the officers' description of Covington's statements, including Covington's identification of his assailant, under the State's excited utterance exception to the hearsay rule, which permits the introduction of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Mich. R. Evid. 803(2); see J.A. 70-72; see also Pet. App. 2A. After an earlier jury hung, a second jury on retrial convicted respondent

of second-degree murder and the two firearms offenses. *Id.* at 10A.

3. The Michigan Court of Appeals affirmed. Pet. App. 1A-7A. While the appeal was pending, this Court issued its decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), which held that the Confrontation Clause generally precludes the admission of out-of-court "testimonial" statements if the declarant is not present at trial for cross-examination. Relying on *Crawford*, petitioner argued that the admission of Covington's statements to the police violated the Confrontation Clause. The court rejected the argument, concluding that Covington's statements were not testimonial because they were "not the result of police interrogation" and were "not any type of '*ex parte* in-court testimony or its functional equivalent.'" Pet. App. 3A (quoting *Crawford*, 541 U.S. at 51).

4. While respondent's application for leave to appeal to the Michigan Supreme Court was pending, this Court issued its decision in *Davis* v. *Washington*, 547 U.S. 813 (2006), which concerned whether statements made to law enforcement personnel during a 911 call and at a crime scene were testimonial under *Crawford*. The Court held in *Davis* that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," but "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution." *Id.* at 822.

The Michigan Supreme Court remanded the case to the Michigan Court of Appeals for further consideration in light of *Davis*. *People* v. *Bryant*, 722 N.W.2d 797 (2006). On remand, the Michigan Court of Appeals again affirmed. J.A. 147-153.

The Michigan Court of Appeals held that Covington's statements were nontestimonial under the rule articulated in *Davis* because the statements "were made in the course of a police interrogation under circumstances objectively indicating that its primary purpose was to enable police assistance to meet an ongoing emergency." J.A. 152. The court explained that "[t]he police were, indeed, responding to an emergency—someone at the gas station was shot and laying on the ground." J.A. 151. The court further concluded that the officers' questions were aimed at responding to that emergency: the questions were designed to determine if Covington was the victim of a crime and if the perpetrator posed a continuing threat. J.A. 151-152. Although the court agreed with respondent that Covington's answers would also aid a criminal investigation, the court found that "the *primary* purpose" of the questioning was not to investigate a past crime but "to assess the potentially dangerous situation as quickly as possible in an attempt to secure the victim's, their own, and the general public's safety." J.A. 152.

5. A divided Michigan Supreme Court reversed. Pet. App. 8A-47A.

a. The majority found that "'the primary purpose' of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator" and not "to enable the police to meet an ongoing emergency." Pet. App. 16A. In support of that conclusion, the court emphasized that Covington's state-

ments "related solely to events that had occurred in the past and at a different location" and were made in response to questions asking "what had happened in the past, not what was currently happening." *Ibid.* In the Court's view, the relevant emergency "was over once the victim was able to escape from [respondent] and drive six blocks to the gas station." *Id.* at 16A n.8.

The Michigan Supreme Court rejected the State's argument that the emergency continued while the police were actively attempting to find and apprehend the perpetrator, reasoning that the argument would "effectively render non-testimonial all statements made before the offender was placed behind bars." Pet. App. 18A. The court also rejected the argument that Covington's statements were nontestimonial because police were responding to a seriously wounded person, reasoning that the argument would mean that "all statements made while the police are questioning a seriously injured complainant would be rendered non-testimonial." *Id.* at 19A. The court considered that result to be "clearly inconsistent with the commands of the Supreme Court by confusing a medical emergency with the emergency circumstances of an ongoing criminal episode." *Ibid.*

Finally, although the Michigan Supreme Court acknowledged that a testimonial statement might be admissible if it were considered a dying declaration, see Pet. App. 23A & n.18 (citing *Crawford*, 541 U.S. at 56 n.6), the Michigan Supreme Court held that the State had failed to preserve that issue and that the record did not support application of the dying declaration rule. *Id.* at 23A-26A.

b. Three justices dissented. For the reasons given by the Michigan Court of Appeals, Justice Weaver would have affirmed on the ground that "the declarant's state-

ments were made in the course of a police interrogation under circumstances objectively indicating that the interrogation's primary purpose was to enable police assistance in an ongoing emergency. Pet. App. 27A.

In a separate dissent, Pet. App. 27A-35A, Justice Corrigan, joined by Justice Young, criticized the court for examining the facts "in hindsight, rather than with an objective view of the circumstances at the time the statements were made," *id.* at 28A, and for reading this Court's cases as establishing "a bright-line rule * * * that an emergency ends the moment the assailant and victim are physically separated to any extent," *id.* at 30A. Justice Corrigan emphasized that, when the police questioned Covington, "the shooting had just occurred, the statements were made only blocks away from the crime, the victim was in pain from untreated wounds that would soon prove to be fatal and was having trouble talking, and it was uncertain whether he, the police, or the public were out of physical danger." *Id.* at 32A-33A. In Justice Corrigan's view, those circumstances were sufficient to establish that "the emergency was ongoing and the victim's statements were non-testimonial." *Id.* at 33A.

SUMMARY OF ARGUMENT

The Michigan Supreme Court erred in holding that a shooting victim acted as a "witness" against respondent when he identified respondent as his assailant in response to police officers' initial on-the-scene questioning.

The Confrontation Clause of the Sixth Amendment, as interpreted in *Crawford* v. *Washington*, 541 U.S. 36, 51 (2004), entitles a criminal defendant to confront those "who 'bear testimony'" against him. Absent a prior op-

portunity for cross-examination, the Court held, the Clause generally prohibits the government from introducing in a criminal trial a declarant's out-of-court testimonial statements if the declarant does not appear and thus cannot be cross-examined.

Although the Court in *Crawford* did not provide a comprehensive definition of the term "testimonial," it made clear that the term applies to those modern practices most closely related to the historical use of *ex parte* examinations as evidence against the accused, including the use of a formal, recorded statement given in response to a structured custodial interrogation. But as the Court made clear in *Davis* v. *Washington*, 547 U.S. 813 (2006), not all statements given in response to law-enforcement questioning are "testimonial." Statements given in response to questioning that, objectively considered, is primarily aimed at enabling police assistance to meet an ongoing emergency are not properly considered testimonial. Such questioning bears little resemblance to the historical abuses that animated the Confrontation Clause, and an individual who responds to such questions does not act as a "witness" against the accused.

In this case, the police officers who questioned Covington were responding to reports of an emergency. They arrived to discover a critically injured individual suffering from a recently inflicted gunshot wound, from which he would die a few hours later. Viewed objectively, the brief questioning that followed was not designed primarily to elicit testimonial evidence for use in a future prosecution. The few questions the officers asked—"what had happened, who had shot him, and where the shooting had occurred," Pet. App. 15A—sought exactly the information needed to permit the officers to assess the situation and the existence of a

threat to the public safety. Covington's responses to those questions were not testimonial, and their admission in Covington's absence did not violate the Confrontation Clause.

ARGUMENT

THE CONFRONTATION CLAUSE DOES NOT BAR ADMISSION OF A SHOOTING VICTIM'S RESPONSES TO POLICE OFFICERS' INITIAL ON-THE-SCENE QUESTIONING

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Court held that the Confrontation Clause bars the introduction into evidence at a criminal trial of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id.* at 51, 53-54.

In this case, shortly after Anthony Covington was shot, and while he lay on the ground in pain with his shooter at large, he answered police officers' on-the-scene questions about "what had happened, who had shot him, and where the shooting had occurred." Pet. App. 15A. Those statements were not "testimonial" within the meaning of *Crawford*. An individual does not act as a "witness" when he responds to law-enforcement questioning that, viewed objectively, is designed primarily to enable police officers to meet an ongoing emergency. *Davis* v. *Washington*, 547 U.S. 813, 822 (2006). A report of an individual suffering from a serious, recently inflicted wound objectively signals the existence of such an emergency, and the inquiries made by the police officers on the scene were targeted precisely to

assess the situation and the threat to public safety. In these circumstances, the Confrontation Clause does not bar the introduction of the victim's responses as evidence at trial.

A. Statements Responding To Emergency Questioning Are Not Testimonial Under *Crawford*

1. After reviewing the origin of the confrontation right, the Court in *Crawford* concluded that the Confrontation Clause's principal concern is "testimonial" hearsay. The historical record demonstrated that the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50. Pretrial examinations had become common in England under the Marian bail and committal statutes, see 1 & 2 Phil. & M., c. 13 (1554), under which justices of the peace would formally examine criminal suspects and witnesses before trial and then certify the written results to the trial court. The results were used as evidence in some cases. *Crawford*, 541 U.S. at 43-44. English law developed a confrontation right in reaction to the practice of reading official examinations at trial "in lieu of live testimony, a practice that 'occasioned frequent demands by the prisoners to have * * * the witnesses against him * * * brought before him face to face.'" *Id.* at 43 (quoting 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 326 (1883)); see, *e.g.*, *Raleigh's Case*, 2 How. St. Tr. 1, 15-16 (1603) ("Call my accuser before my face.").

The Court explained that the text of the Confrontation Clause, which guarantees a criminal defendant's right to confront "the witnesses against him," reflected

the historical concerns underlying the development of the confrontation right. Citing a 1828 dictionary, the Court noted that the term "witnesses" was understood to refer to those who "bear testimony," and "[t]estimony," in turn, was understood as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (quoting 2 Noah Webster, *An American Dictionary of the English Language* 114 (1828)). The Confrontation Clause's use of the term "witnesses" thus "reflects an especially acute concern with a specific type of out-of court statement." *Ibid.* As the Court noted, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Ibid.*

Although the Court in *Crawford* did not provide a "comprehensive" definition of the term "testimonial," it made clear that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations"—that is, "the modern practices with closest kinship to the abuses at which the Confrontation Clause is directed." 541 U.S. at 68; see also *id.* at 52.[1] Applying that understanding, the Court held that the evidence at issue in the case—a tape-recorded statement made while the declarant was in police custody, after she had been given *Miranda* warnings, and "given in response to structured police questioning"—was testimonial. *Id.* at 53 n.4. The admission of the statement at trial, where the defendant

---

[1] The Court noted that it used "the term 'interrogation' in its colloquial, rather than any technical legal, sense." *Crawford*, 541 U.S. at 53 n.4.

had no opportunity to cross-examine the declarant, therefore violated the Sixth Amendment. *Id.* at 68.[2]

2. The Court clarified the scope of *Crawford*'s bar on the admission of testimonial hearsay in *Davis*, which concerned whether certain statements given in response to law-enforcement questioning qualify as testimonial. See 547 U.S. at 817. While again declining to provide a comprehensive definition of "testimonial," the Court rejected the argument that all statements given to law-enforcement personnel so qualify. *Id.* at 826-827. The Court noted that, in particular cases, law-enforcement questioning may not be designed "primarily to 'establish or prove' some past fact," *id.* at 827 (brackets omitted), but instead to "describe current circumstances requiring police assistance," *ibid.* Identifying no historical example in which a "statement[] made during an ongoing emergency," *id.* at 828, was thought to implicate the confrontation right, the Court concluded that statements "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" are nontestimonial. *Id.* at 822. On the other hand, statements are testimonial if

---

[2] The Court in *Crawford* identified two historical exceptions to the general bar on admission of unconfronted testimonial statements: one for dying declarations, see 541 U.S. at 56 n.6, and the other for statements made by witnesses wrongfully prevented from testifying at trial, *id.* at 62; see *Giles* v. *California*, 128 S. Ct. 2678, 2683 (2008). Neither exception is at issue in this case. The State did not preserve the argument that Covington's statements qualified as dying declarations. See Pet. App. 23A-26A. And in *Giles*, this Court held that the forfeiture-by-wrongdoing exception applies only "when the defendant engaged in conduct *designed* to prevent the witness from testifying," and does not otherwise permit admission at trial of the testimonial statements of murder victims. 128 S. Ct. at 2683, 2693.

"the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Ibid.*

Applying that rule to the facts of *Davis*, the Court found that an assault victim's identification of her assailant in response to questioning by a 911 operator was not testimonial. 547 U.S. at 826-829. The court explained that "[a] 911 call * * * and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establish or prove' some past fact, but to describe current circumstances requiring police assistance." *Id.* at 827 (brackets omitted). The Court also identified several features that distinguished the 911 call from the interrogation in *Crawford*: unlike the declarant in *Crawford*, the 911 caller "was speaking about events *as they were actually happening*," and not "hours after the events she described had occurred"; the declarant "was facing an ongoing emergency" and seeking "help against a bona fide physical threat"; "the nature of what was asked and answered, * * * viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past"; and "the difference in the level of formality between the two interviews [was] striking." *Ibid.* "[F]rom all this," the Court concluded that the declarant in *Davis* "simply was not acting as a *witness*; she was not *testifying*." *Id.* at 828.

By contrast, in *Davis*'s companion case, *Hammon* v. *Indiana*, the Court found that an assault victim's statements to police arriving on the scene of a reported domestic disturbance were testimonial. *Davis*, 547 U.S. at

829. Upon the officers' arrival, the declarant had told them that "things were fine * * * and there was no immediate threat to her person"; the officers then separated her from the defendant and had her "deliberately recount[]" the details of the criminal event. *Id.* at 830. The Court found that these "statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination." *Ibid.* The Court declined, however, to foreclose the possibility that "questions at a scene will yield nontestimonial answers." *Id.* at 832. The Court acknowledged that officers called to the scene of a reported domestic disturbance "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim," *ibid.* (quoting *Hiibel* v. *Sixth Judicial Dist. Ct.*, 542 U.S. 177, 186 (2004)), and that "[s]uch exigencies may *often* mean that 'initial inquiries' produce nontestimonial statements," *ibid.* The Court held only that when the declarant's statements "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial." *Ibid.*

B. Covington's Statements Were The Product Of Police Questioning Primarily Designed To Respond To An Ongoing Emergency And Were Therefore Nontestimonial

1. Under the standard articulated in *Davis*, Covington's statements were nontestimonial. Although they were made in the course of police interrogation, the circumstances objectively indicated "that the primary purpose of the interrogation [was] to enable police assis-

tance to meet an ongoing emergency." *Davis*, 547 U.S. at 822.

The police officers in this case arrived on the scene at the gas station in response to reports that a man had been shot. When they arrived, they found Covington on the ground suffering from a recently inflicted gunshot wound. At the time, they did not know who Covington was, whether the shooting had occurred at the gas station or at a different location, who the assailant was, or whether the assailant posed a continuing threat to Covington or others. The questions the officers posed—"what had happened, who had shot him, and where the shooting occurred," Pet. App. 15A—were reasonably necessary "to assess the situation, the threat to their own safety, and possible danger to the potential victim," as well as the public at large. *Davis*, 547 U.S. at 832 (quoting *Hiibel*, 542 U.S. at 186). In responding to those questions while lying in the gas station lot, Covington "was not acting as a *witness*"; he "was not *testifying*." *Id.* at 828. He was instead providing information necessary for the police officers to evaluate and respond to the "exigencies" of the situation. *Id.* at 832.

2. The circumstances of the questioning in this case bear no resemblance to the historical abuses at which the confrontation right is directed. Unlike in, for example, *King* v. *Dingler*, 168 Eng. Rep. 383 (1791), the police officers in this case did not depose (and indeed had no opportunity to depose) a victim in the absence of the defendant, with an eye to preserving that unconfronted testimony for use at a later trial. Cf. *Davis*, 547 U.S. at 828 (characterizing the statement in *Dingler* as "a weaker substitute for live testimony") (quoting *United States* v. *Inadi*, 475 U.S. 387, 394 (1986)). Instead, the police arrived at the scene to discover a critically

wounded victim who lay bleeding on the ground, with the perpetrator at large. The information they sought was vital to evaluate the situation and to formulate an appropriate response.

And much as in *Davis*, the distinctions between the questioning here and the interrogations at issue in *Crawford* and *Hammon* are "apparent on the face of things." *Davis*, 547 U.S. at 827. Whereas the responding officers in *Hammon* heard from the victim that "things were fine," *id.* at 830, the officers who responded to the gas station saw when they arrived that things were *not* fine. Whereas the suspected perpetrators in *Crawford* and *Hammon* had been identified and any danger they presented had effectively been neutralized, see *Crawford*, 541 U.S. at 38 (defendant arrested); *Davis*, 547 U.S. at 830 (defendant in presence of the police and forcibly separated from the victim), the identity and whereabouts of Covington's assailant were unknown to the officers when they began their questioning.

Significantly, whereas the interrogations in *Crawford* and *Hammon* were formal and deliberate, see *Crawford*, 541 U.S. at 53 n.4; *Davis*, 547 U.S. at 819-820, 830-831, the interrogation in this case was, of necessity, informal and unstructured. The informality of the questioning stands in sharp contrast to the kinds of formal statements that have traditionally been thought to implicate the confrontation right. See *Davis*, 547 U.S. at 825-826, 827, 830 n.5; see also *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring) (taking the view that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions") (internal quotation marks and citation omitted);

Giles v. *California*, 128 S. Ct. 2678, 2694 (2008) (Alito, J., concurring) (questioning whether statements made to a police officer responding to a domestic-violence report qualified as "testimonial"). The police officers had no control over the location of the interview; they had only a few minutes to ask questions before the paramedics arrived; and they had no opportunity to structure their questions, much less attempt to shape Covington's testimony for use at a future criminal trial. Cf. *Crawford*, 541 U.S. at 56 n.7 (raising concerns that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse").

C. The Michigan Supreme Court Erred In Concluding Covington's Statements Were Inadmissible Under The Confrontation Clause

1. In concluding that the admission of Covington's statements to police violated the Sixth Amendment, the Michigan Supreme Court reasoned that the "primary purpose" of the police officers' questioning could not have been to "enable police assistance to meet an ongoing emergency" because the shooting had already occurred and the "police asked the victim what had happened in the past, not what was currently happening." Pet. App. 15A-16A. The court was mistaken. Although *Davis* involved a present-tense report to a 911 operator, see 547 U.S. at 817, and *Hammon* a past-tense report to a note-taking police officer, see *id.* at 831-832, the Court in *Davis* did not assign dispositive significance to that fact. In this case, the existence of an emergency—and a purpose of responding to that emergency—did not vanish as soon as the gun was fired and the now-wounded Covington fled the scene. When the police

found Covington, they knew that an armed assailant had recently shot a man and could have been in the immediate vicinity—or could have gone elsewhere in search of other victims. A reasonable officer's primary purpose in asking a critically wounded person about what happened is not, as in *Hammon*, to "nail down the truth about past criminal events" for future use in a potential criminal prosecution. *Id.* at 830. That purpose is instead to help the officer better understand "what was currently happening"—that is, to assess the nature of a present threat to public safety.

2. The historical record does not support a bright-line temporal rule of the sort the court below applied in this case. Both before and after the Framing of the Confrontation Clause, English and American courts allowed witnesses to testify about victims' statements made shortly after, as well as during, the relevant criminal act. See, *e.g.*, *Thompson* v. *Trevanion*, 90 Eng. Rep. 179 (K.B. 1694) (admitting the statement of a victim made "immediate upon the hurt received, and before [the victim] had time to devise or contrive any thing for her own advantage"). For example, in *Rex* v. *Foster*, 172 Eng. Rep. 1261 (1834), the defendant was charged with running the victim over in a cab. A witness who did not see the initial incident approached the victim groaning and near death in the street and was told what happened, a statement that the court found admissible as part of the res gestae. Other American decisions are to similar effect. See *Commonwealth* v. *M'Pike*, 57 Mass. (3 Cush.) 181, 182, 184 (1849) (admitting victim's statement, after she had escaped to another room and the witness had gone to find help, that the defendant had stabbed her); see also *Insurance Co.* v. *Mosley*, 75 U.S. (8 Wall.) 397, 405-409 (1869) (citing *Trevanion*, *Foster*,

and *M'Pike*, and concluding that statements made shortly after the infliction of injury are admissible as proof of the matter asserted). The Framers would not have understood the law categorically to forbid admission of unconfronted past-tense descriptions of recent attacks.

3. The Michigan Supreme Court attached significance to its belief that Covington's "primary purpose" in responding to the police questioning was "[o]bviously" not to seek police protection for himself from an ongoing physical threat, but to provide the police with information about the whereabouts and identity of the shooter so as to facilitate a prosecution. Pet. App. 16A. That reasoning is flawed for at least three reasons. First, the Michigan court's speculation about the victim's purposes is just that. Covington could just as easily have feared another attack against himself or his family; his state of mind as he lay bleeding on the ground is essentially unknowable. The application of the Confrontation Clause analysis does not depend on such indeterminate conjectures about a victim's state of mind. Second, although *Davis* did recognize that the Confrontation Clause applies to statements rather than questions, 547 U.S. at 822 n.1, the test that *Davis* adopted focused on the objective "primary purpose" of an interrogation, *id.* at 822, because that inquiry properly identifies "those who 'bear testimony,'" *id.* at 823 (quoting *Crawford*, 541 U.S. at 51). The Michigan Supreme Court thus erred in substituting a hypothetical-declarant-intent test for *Davis*'s focus on the objective primary purpose of the interrogation. Third, even when a victim's own safety is secured, as the Michigan court believed that Covington's was, Pet. App. 16A, the police have need of information about the shooter in order to assess the threat to their own

safety, see *Davis*, 547 U.S. at 832, and to others to whom the shooter may pose a danger. An emergency posed by an unknown shooter who remains at large does not automatically abate just because the police can provide security to his first victim.

4. To acknowledge that the officers' interrogation in this case was primarily designed to respond to an ongoing emergency, rather than to gather testimonial evidence about a past crime, is not to hold that any statement made while a perpetrator remains at large, or when police respond to a seriously injured victim, will be nontestimonial. See Pet. App. 18A-19A. The inquiry *Davis* requires is necessarily context-dependent; the circumstances attending the initial inquiry of police arriving on the scene of a reported shooting are likely to differ in relevant respects from, for example, the inquiry of police searching for the perpetrator of a nonviolent crime, or responding to a victim seriously injured in a car crash, rather than gunfire.

As has been true in its prior cases, there is no need for this Court to attempt to provide "an exhaustive classification" of "all conceivable statements in response to police interrogation" as testimonial or nontestimonial. *Davis*, 547 U.S. at 822. It suffices to recognize that, in the context of this case, the police officers' initial inquiries of the shooting victim were, objectively considered, primarily aimed at meeting an "ongoing emergency" under any reasonable definition of that term. *Ibid.* Admission of the resulting statements at trial, in the absence of the now-deceased victim, did not deprive respondent of his constitutional right to confront the witnesses against him.

CONCLUSION

The judgment of the Supreme Court of Michigan should be reversed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LEONDRA R. KRUGER
Assistant to the Solicitor General
DAVID E. HOLLAR
Attorney

MAY 2010

AMICUS CURIAE BRIEF

No. 09-150

In The
Supreme Court of the United States

THE STATE OF MICHIGAN,

Petitioner,

v.

RICHARD PERRY BRYANT,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Michigan

BRIEF OF RICHARD D. FRIEDMAN, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

RICHARD D. FRIEDMAN
Counsel of Record, Pro Se
625 South State Street
Ann Arbor, Michigan 48109
Telephone: (734) 647-1078
Facsimile: (734) 647-4188
E-mail: rdfrdman@umich.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. WHETHER A STATEMENT IS TESTIMONIAL SHOULD BE DETERMINED FROM THE PERSPECTIVE OF THE SPEAKER. COVINGTON'S STATEMENTS WERE CLEARLY TESTIMONIAL. 5

II. A STATEMENT THAT WOULD OTHERWISE BE DEEMED TESTIMONIAL SHOULD NOT BE CHARACTERIZED AS NON-TESTIMONIAL ON THE GROUND THAT IT WAS MADE INFORMALLY. 13

III. IF STATEMENTS IN SITUATIONS SIMILAR TO THIS ONE SHOULD BE ADMITTED, IT SHOULD BE ON THE BASIS OF FORFEITURE OF THE CONFRONTATION RIGHT. 15

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Briscoe v. Virginia, 130 S.Ct. 1316 (2010) 1

Crawford v. Washington,
541 U.S. 36 (2004) 2, 5, 11, 16

Davis v. Washington,
126 S.Ct. 2266 (2006) ..... *passim*

Giles v. California,
128 S.Ct. 2678 (2008) 1, 2, 4, 19, 20, 22, 24, 25

Hammon v. Indiana (decided with *Davis*, *supra*) 1, 10, 15, 16

Thomas John's Case, East P.C. 357-58 (1790) 23

King v. Brasier,
1 Leach 199, 168 Eng. Rep. 202 (1779) 17-18

King v. Dingler, 2 Leach 561, 168 Eng. Rep. 383 (1791) 23

King v. Forbes, Holt 599, 171 Eng. Rep. 354 (1814) 23

King v. Smith, Holt 614, 171 Eng. Rep. 357 (1817) 23

Henry Welbourn's Case, East P.C. 358-60 (1792) . 23

King v. Woodcock, 1 Leach 500, 168 Eng. Rep. 352 (1789) 23

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009) 1, 2, 7

Segura v. United States, 468 U.S. 796 (1984) 11

Terry v. Ohio, 392 U.S. 1 (1968) 11

Thompson v. Keohane, 516 U.S. 99 (1996) 11

United States v. Mendenhall, 446 U.S. 544 (1980) 11

SECONDARY SOURCES

J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800 (1986) 7

John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 518-19 (1994) 7

EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN (1803) 23

LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993) 7

Richard D. Friedman, *Giles v. California: A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733 (2009) 20

Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506 (1997). 20

Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J. L. & Pol. 553 (2007) 11, 14, 15

Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241 (2005) 6, 11

Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171 (2002) 7

THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE (1801) 23

LAWRENCE H. SCHIFFMAN, SECTARIAN LAW IN THE DEAD SEA SCROLLS: COURTS, TESTIMONY AND THE PENAL CODE (1983) 6-7

INTEREST OF *AMICUS CURIAE*[1]

Amicus is a legal academic holding the title of Alene and Allan F. Smith Professor of Law at the University of Michigan Law School. Since 1982 he has taught Evidence law. He is general editor of THE NEW WIGMORE: A TREATISE ON EVIDENCE, and author of THE ELEMENTS OF EVIDENCE (3d ed. 2004).

Much of the academic work of *amicus* has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." He has written many articles and essays on that right, and since 2004 he has maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it. *Amicus* successfully represented the petitioners in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)), and *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010).

As he has previously done in *Giles v. California*, 128 S.Ct. 2678 (2008), and *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), *amicus* submits this brief on behalf of himself only; he has not asked any

---

[1] The parties have consented to the filing of this brief. Written statements of their consent have been filed with the Clerk. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

other person or entity to join in it. He is doing this so that he can express his own thoughts, entirely in his own voice. In some cases, as in *Giles*, his views principally favor the prosecution; in others, as in *Melendez-Diaz* and this case, his views principally favor the defense. His desire, in accordance with his academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime.

Amicus believes that the confrontation right would be severely undercut if the statements at issue in this case were deemed not to be testimonial within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). He believes that decision of this case may require the Court to determine the proper perspective for determining whether a statement is testimonial. In his view, the proper perspective is that of a reasonable person in the position of the speaker; under that perspective the statements here are plainly testimonial. This result, he contends, is clearly in accordance with decisions from the Framing era and before. He recognizes that constitutionally mandated exclusion of the statements may seem intuitively unappealing. The reason, he believes, is that, if what he regards as the optimal doctrine were applied to this case, it is possible that a court would conclude that the accused forfeited the confrontation right. The doctrine of *Giles* appears to foreclose that conclusion (and in any event no question of forfeiture is presented here), but that fact should not cause the Court to constrict the category of testimonial statements.

SUMMARY OF ARGUMENT

For the doctrine governing the confrontation right to develop optimally, it is essential that this Court choose the proper perspective for determining whether a statement shall be deemed to be testimonial. In the view of *amicus*, the proper perspective is that of the speaker – that is, the person who assertedly acted as a witness. A statement should be deemed testimonial if a reasonable person in the position of the speaker would anticipate that it would likely be used for prosecutorial purposes. The apparent purpose of an official investigator – if there was one – in taking the statement may be a significant fact bearing on the speaker's understanding of the situation, but that purpose is not determinative of whether the statement is testimonial. A test based on the purpose of the questioner would be historically inaccurate, would not fit a coherent or complete theory of the confrontation right, and would be very easily subject to manipulation.

In this case, Covington's statements were clearly testimonial. A reasonable person in Covington's position must have understood that his statements would be used in an attempt to bring the assailant to justice. The fact that the assailant was still at large has no bearing on this. Neither does the fact that Covington was in dire physical condition.

To the extent formality is a requisite for a statement to be deemed testimonial, it is satisfied by demonstrating that a reasonable person in the position of the declarant would expect the statement to be used in investigation or prosecution of a crime. It would

make no sense to adopt a separate formality requirement. The purpose of the Confrontation Clause is to ensure that testimony is given under the proper conditions. To hold that a statement clearly made in anticipation of evidentiary use is not testimonial because it was given informally would stand logic on its head and invite witnesses and government authorities to evade the confrontation right by giving and taking such statements informally.

It may be that if optimal doctrine were applied Covington's statements would be admitted. But if so that would be because the trial court concluded that Bryant engaged in serious intentional misconduct that rendered it impractical for him to be confronted with Covington, and so he should be deemed to have forfeited the confrontation right. *Giles v. California*, 128 S.Ct. 2678 (2008), appears to foreclose this possibility. In the view of *amicus*, *Giles* is an unfortunate development that is inimical to sound development of the confrontation right. It is not compelled by history, logic, or equity. This case does not present the Court with a question of forfeiture, but the Court should, when opportunity arises, confine *Giles*. Until such time, it should not attempt to compensate for it by adopting an unduly constrained definition of the category of testimonial statements.

ARGUMENT

I. WHETHER A STATEMENT IS TESTIMONIAL SHOULD BE DETERMINED FROM THE PERSPECTIVE OF THE SPEAKER. COVINGTON'S STATEMENTS WERE CLEARLY TESTIMONIAL.

Under *Crawford v. Washington*, 541 U.S. 36 (2004), the critical consideration in determining whether the confrontation right applies to an out-of-court statement is whether the statement is deemed "testimonial" in nature. Petitioner's Brief is based on the perception that whether a statement of the sort involved here should be deemed testimonial should be determined from the perspective of the investigating officials.[2] This is mistaken. The Confrontation Clause is not a regulation of police conduct. Whether a statement is testimonial for purposes of the Clause should be determined from the perspective of the speaker, the person who is assertedly a witness. A statement should be deemed testimonial if a reasonable person in the speaker's position would understand that it would likely be used for prosecutorial purposes.[3]

---

[2] This orientation, pervasive throughout the brief, is apparent from the very beginning; Petitioner states the Question Presented as: "Are preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting nontestimonial . . . ?" Pet. Br. at i.

[3] "Prosecutorial purposes" is a shorthand meant to indicate that the statement would be used for investigation or prosecution of a crime. Some other anticipated uses could occasionally render a statement testimonial – for example,

Davis v. Washington, 547 U.S. 813 (2006), includes language that, taken out of context, might suggest that, at least in some circumstances, the testimonial character of a statement is determined from the point of view of an official investigator. *Id.* at 822 (referring to "the primary purpose of the interrogation"). But *Davis* recognized that "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* at 822 n.1.

As this latter passage indicates, making the definition of "testimonial" depend on the purpose of an interrogator could not lead to coherent doctrine. For one thing, there is not always an interrogator. Indeed, historically, interrogation may have been more the exception than the rule, because the right to confront adverse witnesses predates the institutions of police forces and public prosecutors by more than two millennia.[4] Even at the time the Confrontation Clause

---

if a reasonable person in the position of the speaker would anticipate that the statement would be used in civil litigation, the statement would arguably be testimonial. There is no need to resolve that question here; Covington's statements were clearly made in anticipation that they would be used to assist investigation and prosecution of a crime.

In *Grappling with the Meaning of "Testimonial"*, 71 BROOKLYN L. REV. 241 (2005) [hereinafter "*Grappling*"], at 255-59, *amicus* has argued at greater length that the question whether a statement is testimonial should be determined from the perspective of the speaker.

[4] *See, e.g.*, LAWRENCE H. SCHIFFMAN, SECTARIAN LAW IN THE DEAD SEA SCROLLS: COURTS, TESTIMONY AND THE PENAL CODE 73 (1983) (quoting Dead Sea Scroll on procedure in case only one person witnesses a capital offense; witness

incorporated the right into the Constitution, there was nothing resembling the modern police force,[5] and both in England and in parts of America most crime was still privately prosecuted.[6] And, as *Davis* recognized, "volunteered testimony" is not "exempt from cross-examination." 547 U.S. at 822 n.1.[7] A theory that made determinative the purpose of the interrogator, when there was one, would therefore necessarily be incomplete; it would require one conceptual construct when there was an interrogator and an altogether different one when there was not, leaving unresolved what the underlying meaning of "testimonial" is.

Furthermore, even when there is an interrogator, it makes no sense for the interrogator's purpose to determine whether the statement is testimonial. It is the speaker who is deemed a witness if his statements are testimonial in nature, and therefore the speaker with whom the accused arguably has a right to be

---

must report crime to examiner in presence of accused, and testimony is recorded, allowing for accumulation of testimony across episodes to satisfy three-witness requirement).

[5] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 67 (1993) (describing the rise of the modern police force as one of the "major social inventions" of the nineteenth century).

[6] J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 35-36 (1986), *quoted in* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1248 n.295 (2002); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 518-19 (1994).

[7] Only in a very strained sense could the laboratory report in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), be considered a response to interrogation.

confronted. If the speaker anticipates that his statement will be used for prosecutorial purposes, the fact that he gives the statement in response to official questioning does not make the statement any less testimonial than it would be if he gave the statement spontaneously; even if at the moment the speaker utters the statement, the interrogator (presumably not knowing the situation as well as the speaker does) does not anticipate or intend the prosecutorial use, that does not deprive the statement of its testimonial character.

On the other side of the coin, if the speaker is not acting as a witness, his statement will not be rendered testimonial by the fact that an official interrogator hopes to use it for prosecutorial purposes. Police seek to draw evidence from many different types of sources – such as inanimate objects, plant material, animals, and fluid traces, in addition to human beings. That the investigator hopes to find or even create evidence for prosecutorial use does not render the source of the evidence a witness for purposes of the Confrontation Clause. It bears emphasis that the Confrontation Clause is not a regulation of police conduct, but rather a rule governing how testimony against an accused must be given. It is the self-conscious testimonial act of the speaker, the purported witness, that renders him subject to the Clause.[8]

---

[8] In some circumstances, the prosecution may be equitably estopped from denying that the statement is testimonial because government agents used trickery to procure a statement from a person who would not have given it had he known that it would be used for prosecutorial purposes. But the equities would not call for such an estoppel if the speaker was engaged in misconduct – most notably, as a

An interrogator perspective would yield some bizarre results, in both directions. On the one hand, suppose an undercover police officer speaks to a conspirator of the ultimate accused, surreptitiously recording the conversation in hopes the speaker will make statements that could be used for prosecution. Under an interrogator perspective, that statement would be deemed testimonial, at least unless the Court adopted a strong formality requirement that, as discussed below, would be utterly inappropriate. On the other hand, suppose a police officer comes to a scene with no understanding that a crime has been committed and asks, "What's going on?" The victim, knowing full well that a crime has been committed, makes a statement describing it, with the knowledge, and indeed the purpose, that the statement will be used for prosecution. But given an interrogator perspective, it appears that statement would be non-testimonial, because the police officer was not attempting to gather evidence for use in prosecution.

For this reason, a test based on an interrogator perspective is particularly subject to manipulation. Virtually always (as in this case), when police begin an interrogation they are less knowledgeable about the situation than is the person being interrogated. Therefore, the officer could nearly always testify, "My primary purpose was not to gather evidence for use in interrogation, because I did not even know a crime had been committed, " or ". . . because until the witness informed me otherwise I thought the situation might be an ongoing emergency." And this means that the confrontation right would be dealt a grievous blow, rendered virtually of no consequence in many

---

conspirator of the eventual accused person.

situations. Indeed, Petitioner appears to contend that any statement made in response to police interrogation before the police have ascertained the identity and location of the perpetrator is non-testimonial. In practical terms, Petitioner's view amounts essentially to the rule flatly rejected by the Court in *Hammon* (the companion to *Davis*), 547 U.S. at 832 – that statements to responding police officers are *per se* non-testimonial.

For much the same reason, an interrogator perspective would distort police incentives, to the detriment of good police work. Emergency dispatchers would know that a statement to a responding police officer would have a greater chance of admission if the officer knew nothing about the situation beforehand; accordingly, the emergency response system would have an incentive to give responding officers as little information as possible before they arrive at the scene. Similarly, a responding officer would know that a statement would be more likely to be admissible at an ultimate trial if at the time of the statement she was not sure she had control of the situation. Confrontation Clause doctrine would therefore give the officer an incentive to try to gain as full statements as possible *before* ensuring that she had such control; she would then have a plausible basis for contending that her primary purpose in seeking the statement was to resolve an ongoing emergency.

In sum, it is important for numerous reasons, both theoretical and practical, that the question whether a statement is testimonial be viewed from the perspective of the purported witness rather than from that of an interrogator. *Amicus* believes that the question should not be one of purpose, primary or otherwise, but rather one of anticipated use; just like

an interrogator, a speaker may have multiple purposes in making a statement, but if it is clear that the statement will be put to prosecutorial use then she is testifying, even if that is not her primary purpose and even if that is not a result she desires at all.[9] *Amicus* also believes it is most appropriate to view the question objectively rather than subjectively – that is, to ask what a reasonable person in the position of the speaker would anticipate, rather than to ask what the speaker actually anticipated.[10] (The apparent purpose of official interrogators, if there are any, may be taken into account in determining what such a person would

---

[9] *See, e.g.*, *Davis v. Washington*, 547 U.S. 813, 839 (Thomas, J., concurring in the judgment in part and dissenting in part). *Amicus* has commented further on this matter in *Crawford, Davis, and Way Beyond*, 15 J. LAW & POL. 553 (2007) [hereinafter "*Way Beyond*"], at 559-60.

[10] The Court has chosen an objective standard in numerous other areas of constitutional criminal procedure. *See, e.g.*, *Thompson v. Keohane*, 516 U.S. 99, 112 (1996) (governing "in custody" determination for *Miranda* purposes: "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave"); *Segura v. United States*, 468 U.S. 796, 820 (1984) ("A 'search' for purposes of the Fourth Amendment occurs when a reasonable expectation of privacy is infringed."); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (governing seizure under Fourth Amendment: whether "a reasonable person would have believed that he was not free to leave"); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("holding that "it is imperative that the facts be judged against an objective standard" in determining reasonableness of stop under Fourth Amendment). Further discussion of the subjective-objective issue in this context is in *Grappling*, *supra*, at 253-54.

anticipate the likely use of the statements to be.[11])

In this case there is no need to resolve these additional issues. It is clear not only that a reasonable person in Covington's position would have anticipated

---

[11] Note that use of an objective standard virtually requires that the question be phrased in terms of anticipation rather than of purpose. It makes little sense to ask, "What would the principal purpose of a reasonable person have been in these circumstances?" Purpose is a matter of desired end, and to say that a person is reasonable does not tell us whether his greater purpose might have been to achieve one end or another. It makes much more sense to ask, "Would a reasonable person in the circumstances have anticipated that the statement would be used prosecutorially?"

The aim of the Confrontation Clause is to prevent the creation of a system in which witnesses can testify under unacceptable conditions. Accordingly, a more theoretically precise way of asking the question may be, "*Assuming hypothetically that the statement would be admissible if it were offered at a trial*, would a reasonable person in the speaker's position anticipate that if in fact the matter came to trial her statement would be offered?" If the answer is affirmative, and the statement is nevertheless admitted, then we have created a system in which witnesses can testify out of court, knowing full well that their statements will likely be admitted at trial. One cannot simply ask the above question without the italicized portion, because a reasonable person understanding the confrontation right might realize that in fact her statement is not admissible. But the italicized portion adds an undesirable complexity to the inquiry; instead of including a possibly counter-factual hypothetical, it is probably better to ask what the reasonable person would anticipate in the real world, but to include other official uses besides admission at trial within the set of anticipations that can render a statement testimonial.

that his statements would be used for prosecutorial purposes, but that Covington himself did, and that his purpose in making the statements was to create evidence for prosecutorial use, by describing the crime and identifying the person who committed it. Covington knew that a serious crime – one unquestionably warranting prosecution – had been committed on him. He knew that the assailant was not at the scene (and indeed, according to his statement, never had been) and that there was no danger in the vicinity; he also presumably knew that the assault was directed at him personally and that there was no imminent danger to anyone else. He knew that the information he provided about the incident could assist in prosecuting the accused, and that it had no significant use in relieving his medical condition. His understanding on these points must have been fortified by the nature of the police officers' questioning, which was plainly directed to bringing the assailant to justice rather than to providing medical assistance.

The conclusion that Covington's statements were not testimonial is not affected by the fact that the person Covington accused was at large at the time. Unlike the declarant in *Davis*, Covington spoke in the presence of police officers, some time after the assault had been completed and with the assailant nowhere near the scene; accordingly, unlike her, he knew throughout the interrogation that he was not in any further immediate danger from the assailant.[12] The

[12] For an argument that "*Davis* is perfectly compatible with a general test based on the anticipation of a reasonable person in the position of the declarant" – especially if that test is applied "from the vantage point that the declarant

fact that the assailant was at large did not alter the fact that he made his statement in anticipation of prosecutorial use. Moreover, a rule that a statement made while the accused assailant is still at large would not only conflict with the express declaration of *Davis*, *see* 547 U.S. at 828-29 (asserting that statements made after a given point in 911 call were testimonial), but would create a particularly perverse incentive, to avoid taking a suspect into custody until all accusers had made full statements.

Similarly, for at least two reasons, the conclusion that Covington's statements were testimonial is not affected by the fact that he was in dire physical condition when he made them. First, the statements did nothing to relieve that condition. The contrast with *Davis* is clear. There, the complainant's call and initial statements were necessary to ensure that the assault would not continue or recur in the immediate future. Here, by contrast, Covington was protected when he made the statement, he knew the assailant was not at the scene, and he was merely describing a closed incident; nothing he said would be of assistance to medical care-givers, who were not even present at the scene. Thus, even assuming that a serious medical problem can constitute an "ongoing emergency" within the meaning of *Davis* – a proposition the Court need not reach – that would be of no avail to the Petitioner in this case. Second, Covington's medical condition did not make it less likely that the statements would be used for prosecutorial purposes. (Indeed, it probably

---

actually occupied, speaking in the heat of the moment" rather than "as if she considered the probable use of her statement after the fact, reflecting calmly while sitting in an armchair" – see *Way Beyond*, *supra*, at 561-63.

made prosecutorial use *more* likely, because the crime warranted prosecution.) Nor – again in contrast with *Davis* – did that condition interfere with his ability to focus on that expected use; the only plausible reason Covington could have made the statements was to lead to the prosecution of the person he identified as his assailant.

II. A STATEMENT THAT WOULD OTHERWISE BE DEEMED TESTIMONIAL SHOULD NOT BE CHARACTERIZED AS NON-TESTIMONIAL ON THE GROUND THAT IT WAS MADE INFORMALLY.

In *Davis,* the Court said that it did "not dispute that formality is indeed essential to testimonial utterance." 547 U.S. at 830 n.5. That, of course, is not a holding that formality *is* essential for a statement to be deemed testimonial. Moreover, this statement came during discussion of the *Hammon* case, and the Court's resolution of that case suggests that there is no independent significance to a formality requirement.[13] That is, if a statement was made in anticipation of prosecutorial use, it will not be deemed non-testimonial on the ground that it was made informally.

The Court said that in *Hammon* "[i]t was formal enough that [the complainant's] interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'" 547 U.S. at 830. These factors do not readily lend themselves to

[13] *Amicus* has made this point at greater length in *Way Beyond, supra,* at 566-71.

characterization as "formal" – but they clearly demonstrate that the shared understanding of the conversation was that the complainant was creating evidence that would likely be used in prosecution.[14]

Indeed, it would stand logic on its head to treat a statement as non-testimonial, even though it was made in anticipation of prosecutorial use, on the ground that it was made informally. The very point of he Confrontation Clause is to ensure that testimony is given under proper conditions – that is, under required formalities. If a statement made in anticipation of prosecutorial use was made informally, that does not mean that it was not testimonial – rather, it means that it was not made under conditions acceptable for use at trial against an accused.

Suppose, then, that after a suspected criminal

---

[14] *See also* 547 U.S. at 826 (noting that early cases "did not limit the exclusionary rule to prior court testimony and formal depositions"; citing passage from *Crawford*, 541 U.S. at 52 n.3, that it is "implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK"; and noting that it is not "conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition"), 830 (noting that the interrogation in *Crawford* was more formal than that in *Hammon*: "While these features certainly strengthened the statements' testimonial aspect – made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events – none was essential to the point."), & n.5 (characterizing the distinction between formal and informal as "vague" and implying that it does not yield a "workable" test).

incident a police officer says to the apparent victim:

> Please tell me what happened. You can do so very informally; I won't take notes or record the conversation. But you should know that if this matter comes to trial I will testify in court and relay your statement to the jury; you won't have to take an oath, confront the accused, or be subjected to cross-examination.

Plainly, if that statement were admissible, then we would have a system in which a witness to a crime can self-consciously create narrative evidence for use at trial without ever having to appear in court, take an oath, or confront the accused – so long as he makes his statement in a way that a court will later deem to be informal. A witness would testify subject to confrontation only if she so chose. If she preferred to avoid coming face to face with the accused, she could simply make an informal statement – perhaps to the police, perhaps to another intermediary, perhaps to no particular audience but in a way that leaves some record – and the relay of that statement to the trial court would suffice in lieu of in-court testimony. Such a system would nullify the confrontation right.

King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779), confirms that there is no separate formality requirement for a statement to be deemed testimonial for confrontation purposes. There, a young child, immediately upon coming home, told her mother and a lodger of an assault just committed on her. The Twelve Judges of Kings Bench held that the two women could not testify at trial to what the child had

said. The basis for the holding was that "no testimony whatever can be legally received except upon oath"; there was no *per se* rule against child witnesses, of any age, "but if they are found incompetent to take an oath their testimony cannot be received." Clearly, the child's statement, though given informally and shortly after the incident, was considered testimonial in nature – and it was not admissible unless given under proper conditions for testimony. *See Davis*, 547 U.S. at 813 (asserting that *Brasier* "would be helpful to Davis" if the child's statements, like those involved in *Davis*, had been made during an ongoing emergency rather than "an account of past events.").

Proper formalities are a requirement for acceptable testimony. If the absence of formality takes a statement out of the reach of the confrontation right, then the right has essentially been squeezed out of our system of criminal justice.

* * *

The question of whether Covington's statements were testimonial is unaffected by the fact that he died several hours after making them. Accordingly, if Covington's statements were non-testimonial in the actual case, they would also be non-testimonial if he had recovered fully and were living near the courthouse at the time of trial. This means that, if the views of Petitioner and its supporting *amici* were to be accepted, in such a case the Confrontation Clause would tolerate admission of his statements to the responding officers even though the state could easily have procured his live testimony, subject to confrontation, but decided not to. As the next section of

this brief indicates, *amicus* does believe that, if the trial court finds as a predicate matter that an accused murdered a witness, that could – under the forfeiture doctrine that *amicus* believes is optimal – provide a basis for admissibility of the witness's testimonial statements. Currently prevailing law precludes this solution. But the Court should not attempt to address the problem of this rather specific situation by adopting, as a general matter, an unduly narrow concept of the term "testimonial."

III. IF STATEMENTS IN SITUATIONS SIMILAR TO THIS ONE SHOULD BE ADMITTED, IT SHOULD BE ON THE BASIS OF FORFEITURE OF THE CONFRONTATION RIGHT.

Amicus believes that Covington's statements were clearly testimonial, and that is the only question before this Court. If, however, in a future case the Court were to adopt what *amicus* regards as the optimal doctrine governing forfeiture of the confrontation right, an accused in a case similar to this one might be held to have forfeited the right.

Giles v. California, 128 S.Ct. 2678 (2008), however, appears to preclude that result; even if the accused murders a witness, it held, that does not suffice to forfeit the confrontation right with respect to that witness unless the murder was *designed* to render the witness unavailable. In the view of *amicus*, *Giles* was an unfortunate decision, one that threatens sound development of the confrontation right – in part by tempting courts to apply too constrained a concept of

"testimonial" in cases such as this.[15] In time, the Court should revisit the issue raised by *Giles*. In the meantime, it should not attempt to compensate for an overly narrow doctrine of forfeiture by adopting an unduly narrow definition of "testimonial."

Amicus believes that the accused should be held to have forfeited the confrontation right with respect to a witness if his serious intentional misconduct – the most obvious example of which is murder – had the foreseeable consequence of rendering the witness unavailable to testify subject to confrontation. Forfeiture should result whether or not the accused engaged in that conduct *for the purpose* of rendering the witness unavailable. The prosecution should not be able to invoke forfeiture doctrine, however, if it failed to take reasonable measures that were available to it and that would have mitigated the problem; in some circumstances, taking the witness's deposition is such a measure.

The justices in the *Giles* majority based their decision to incorporate a purpose element into forfeiture doctrine on three grounds. One was the perceived "near circularity," 128 S. Ct. at 2694 (Souter, J., concurring in part), of holding that the accused forfeited the confrontation right on the basis of the same misconduct with which he is charged. But this coincidence of issues (which still occurs under *Giles*, if the purpose element is satisfied) should not be

---

[15] *Amicus* has offered a fuller critical analysis of the *Giles* decision in *Giles v. California: A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733 (2009), from which part of this section of the brief is adapted. He also analyzed the forfeiture issue at length in *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506 (1997).

regarded as a genuine problem. To secure a conviction, the prosecution must prove to the trier of fact (a jury if there is one) that the accused committed the crime. As a separate matter, to justify the admission of particular statements, the prosecution must prove to the judge that the accused committed misconduct rendering the witness unavailable. It so happens that the two acts are the same, but that does not affect either fact-finding process. The two processes are held for different purposes, presumably before different fact-finders, on different bodies of evidence, and subject to different standards of persuasion. If the judge decides that in fact the accused did commit the forfeiting misconduct, she may simply admit the evidence, but of course she need not announce her factual conclusion to the jury. The situation is exactly comparable to the one that has prevailed for many years with respect to conspiracy cases in which the prosecution seeks to admit evidence on the basis that it was made in furtherance of the very conspiracy being charged.

Second was considerations of equity. But by hypothesis, the accused murdered the witness. The seriousness and wrongfulness of the conduct are beyond question, and it also was readily foreseeable that the conduct would render the witness unavailable to testify at trial. *Amicus* believes that in this circumstance the equities weigh heavily *against* allowing the accused to preclude admission of the witness's statements on the ground that he was unable to be confronted with the witness – even though his wrongful purpose was something other than to create that unavailability. The accused ought not be able to complain about the clearly foreseeable consequences of

his own serious intentional wrongdoing.

Finally, the lead opinion in *Giles* emphasized history. It took as a premise that in the Framing era and earlier there were no cases in which forfeiture was applied absent a purpose to render the witness unavailable. Under this argument, the dying declaration exception would have been essentially superfluous if forfeiture doctrine could be applied absent such a purpose; without such a purpose requirement, forfeiture would apply to virtually all dying declaration cases and more,[16] because the dying declaration doctrine has an imminence requirement while forfeiture does not.

The argument does not recognize, however, that the dying declaration cases, including their imminence requirement, can themselves easily be explained as applications of sound forfeiture doctrine, bounded by a mitigation requirement, without a need for demonstrating purpose to render the witness unavailable. A mitigation requirement makes sense because it expresses the principle that, even if the accused's wrongdoing was the initial cause of the witness's unavailability, the prosecution cannot stand idly by and later invoke forfeiture doctrine if it has available to it but forgoes reasonable means to preserve the confrontation right in whole or part; the requirement is comparable to the idea of the last clear chance in tort.

Thus, suppose that in the Framing era a victim of

---

[16] This assumes (accurately, *amicus* believes) that in most cases in which the dying declaration doctrine is invoked, the court could make a (nearly circular?) predicate finding that the accused committed the killing charged.

a grievous assault lingered for a time and subsequently died. It was standard practice to take a formal, testimonial statement from her. If death appeared to be imminent at the time, then the statement could be admitted at the accused's murder trial, even though the accused never had an opportunity for confrontation.[17] But if death did not appear imminent at the time, then the statement was not admissible unless the authorities provided the accused with an opportunity for confrontation.[18]

---

[17] *See, e.g.*, *King v. Woodcock*, 1 Leach 500, 168 Eng. Rep. 352, 354 (1789).

[18] *See King v. Forbes*, Holt 599, 171 Eng. Rep. 354 (1814); *King v. Smith*, Holt 614, 171 Eng. Rep. 357 (1817); *King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383 (1791); *Thomas John's Case* (1790), reported in 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 357-58 (photo. reprint 2006) (1803); *Henry Welbourn's Case* (1792), reported in *id.* at 358-60. In *Forbes*, the accused was present for only part of the deposition – and only that part was held admissible. In *Smith*, also, the accused appeared when the proceeding was well under way – but the victim was re-sworn, the testimony already given was read back, the victim reaffirmed it, and all was held admissible.

THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE (1801), presents a nice juxtaposition, summarizing the law and showing the relation of the deposition and dying declaration rules. On pages 40-41, Peake asserts that a deposition taken under the so-called Marian statutes may be admitted at trial if the witness has died and the accused was present, but that if the accused was not present the deposition may not be admitted. A listing of Errata, p. xii, qualifies this by noting that the statement may yet be admitted if the witness was "apprehensive of, or in imminent danger of death."

This set of holdings reflects very well a sound doctrine of forfeiture, limited by a mitigation requirement. That is, the results of the Framing-era cases are consistent with these propositions of law:

> (1) An accused forfeits the confrontation right with respect to statements by a witness if his inability to be confronted with the witness is attributable to the fact that he murdered the witness.
>
> (2) Proposition (1) does not apply if it was reasonably possible before the witness's death to take a deposition, but prosecuting officials did not do so.

These principles cannot be applied to the present case; *Giles* is the governing law, and in any event no question of forfeiture has been raised before this Court. But suppose that in the future the Court adopts these principles and then a case similar to this one arises. The trial court would first determine, as a predicate matter, whether the accused had murdered the victim. If it answered in the affirmative, it would then ask whether the state could, feasibly and humanely, have taken the victim's deposition. As the Framing-era cases indicate, the fact that the victim was severely wounded and died not long after does not in itself preclude the possibility that a deposition could be taken. But a court might well find – especially if the accused is still at large – that there was no feasible and humane way in which the victim's deposition could have been taken. If so, the court would then conclude

that the accused forfeited the confrontation right.

Amicus submits that the combination of doctrines advocated here would provide a sensible rubric under which the admissibility of statements like those of Covington should be determined: The statements are clearly testimonial, because made in anticipation of prosecutorial use, but if the trial court finds as a predicate matter that the accused murdered the victim and that a deposition was not practical, the accused forfeited the confrontation right. *Giles* appears to foreclose this result for now; in time, the Court may wish to revisit the holding of *Giles*. But for now, it is critical that the Court not attempt to compensate for *Giles* by adopting an unduly narrow, and generally applicable, concept of the key term "testimonial."

CONCLUSION

For the foregoing reasons, the judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

RICHARD D. FRIEDMAN
Counsel of Record, Pro Se
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078

June 23, 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAY 6 - 2010
OFFICE OF THE CLERK

No. 09-150

In the
Supreme Court of the United States

THE STATE OF MICHIGAN,
PETITIONER,

v.

RICHARD PERRY BRYANT,
RESPONDENT.

On Writ of Certiorari to
the Supreme Court of Michigan

BRIEF FOR THE STATES OF MARYLAND, UTAH, VERMONT, HAWAI'I, NEVADA, ALABAMA, ARKANSAS, DELAWARE, MISSISSIPPI, ARIZONA, OKLAHOMA, MAINE, NEW MEXICO, LOUISIANA, ALASKA, MASSACHUSETTS, WYOMING, WISCONSIN, SOUTH DAKOTA, TEXAS, MINNESOTA, WASHINGTON, IDAHO, VIRGINIA, COLORADO, ILLINOIS, PENNSYLVANIA, OHIO, CONNECTICUT, KANSAS, NEBRASKA, MONTANA, INDIANA, SOUTH CAROLINA, NEW HAMPSHIRE, AND FLORIDA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DOUGLAS F. GANSLER
Attorney General of Maryland

Brian S. Kleinbord
Assistant Attorney General

Robert Taylor, Jr.*
Assistant Attorney General

200 St. Paul Place
Baltimore, MD 21202
(410) 576-6419
rtaylor@oag.state.md.us

* Counsel of Record
[additional counsel listed inside cover]

State of Utah
Mark L. Shurtleff
Attorney General
Utah State Capitol
Suite #230
PO Box 142320
Salt Lake City, UT 84114

State of Vermont
William H. Sorrell
Attorney General
109 State Street
Montpelier, VT 05609

State of Hawai'i
Mark J. Bennett
Attorney General
425 Queen St.
Honolulu, HI 96813

State of Nevada
Catherine Cortez Masto
Attorney General
100 North Carson Street
Carson City, NV 89701

State of Alabama
Troy King
Attorney General
500 Dexter Avenue
Montgomery, AL 36130

State of Arkansas
Dustin McDaniel
Attorney General
323 Center Street
Little Rock, AR 72201

State of Delaware
Joseph R. Biden III
Attorney General
820 N. French Street
Wilmington, DE 19801

State of Mississippi
Jim Hood
Attorney General
P.O. Box 220
Jackson, MS 39205

State of Arizona
Terry Goddard
Attorney General
1275 W. Washington St.
Phoenix, AZ 85007

State of Oklahoma
W.A. Drew Edmondson
Attorney General
313 N.E. 21st Street
Oklahoma City, OK
73105

State of Maine
Janet T. Mills
Attorney General
Six State House Station
Augusta, ME 04333

State of New Mexico
Gary K. King
Attorney General
P. O. Drawer 1508
Santa Fe, NM 87504

State of Louisiana
James D. "Buddy"
Caldwell
Attorney General
PO Box 94005
Baton Rouge, LA 70804

State of Alaska
Daniel S. Sullivan
Attorney General
P.O. Box 110300
Juneau, AK 99811

Commonwealth of
Massachusetts
Martha Coakley
Attorney General
One Ashburton Place
Boston, MA 02108

State of Wyoming
Bruce A. Salzburg
Attorney General
123 State Capitol
Cheyenne, WY 82002

State of Wisconsin
J. B. Van Hollen
Attorney General
17 W. Main Street
Madison, WI 53707

State of South Dakota
Marty J. Jackley
Attorney General
1302 E. Highway 14
Pierre, SD 57501

State of Texas
Greg Abbott
Attorney General
P.O. Box 12548
Austin, TX 78711

State of Minnesota
Lori Swanson
Attorney General
102 State Capitol
75 Rev. Dr. Martin
Luther King, Jr. Blvd.
St. Paul, MN 55155

State of Washington
Robert M. McKenna
Attorney General
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504

State of Idaho
Lawrence G. Wasden
Attorney General
P O Box 83720
Boise, ID 83720

Commonwealth of
Virginia
Kenneth T. Cuccinelli, II
Attorney General
900 East Main St.
Richmond, VA 23219

State of Colorado
John Suthers
Attorney General
1525 Sherman St.
Denver, CO 80203

State of Illinois
Lisa Madigan
Attorney General
100 W. Randolph St.,
12th Floor
Chicago, IL 60601

Commonwealth of
Pennsylvania
Thomas W. Corbett, Jr.
Attorney General
16th Floor, Strawberry
Square
Harrisburg, PA 17120

State of Ohio
Richard Cordray
Attorney General
30 East Broad Street,
17th Floor
Columbus, Ohio 43215

State of Connecticut
Kevin T. Kane
Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067

State of Kansas
Steve Six
Attorney General
120 SW 10th Ave, 2nd
Floor
Topeka, KS 66612

State of Nebraska
Jon Bruning
Attorney General
PO Box 98920
Lincoln, NE 68509

State of Montana
Steve Bullock
Attorney General
P.O. Box 201401
Helena, MT 59620

State of Indiana
Gregory F. Zoeller
Attorney General
302 W. Washington St.
IGC-South, Fifth Floor
Indianapolis, IN 46204

State of South Carolina
Henry D. McMaster
Attorney General
P. O. Box 11549
Columbia, SC 29211

State of New Hampshire
Michael A. Delaney
Attorney Genera
33 Capitol Street
Concord, NH 03301

State of Florida
Bill McCollum
Attorney General
The Capitol, PL-01
Tallahassee, FL 32399

QUESTION PRESENTED

Are the statements of a gunshot victim regarding his shooting, made immediately after the assault as he was dying of his wounds in the parking lot of a Detroit gas station, "nontestimonial" and thus admissible under the Confrontation Clause of the Sixth Amendment?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Interest of the Amici Curiae 1

Statement 1

Summary of Argument 4

Argument 7

A. The statement was not testimonial because there was no indication of any formality surrounding its making, and there was no sign that it was intended to substitute for trial testimony. 9

B. An excited utterance was historically recognized as not falling within the right of confrontation, and is not "testimonial." 18

Conclusion 27

TABLE OF AUTHORITIES

Cases — Page

Aveson v. Kiniard, 102 Eng. Rep. 1258 (1805) . . . 21

Crawford v. Washington, 541 U.S. 36 (2003) . 1, *pass.*

Davis v. Washington, 547 U.S. 813 (2006) . . . 1, *pass.*

Dowdell v. United States, 221 U.S. 325 (1911) . . . 13

Giles v. California, ___ U.S. ___, 128 S.Ct. 2678 (2008) . . . . . 14, *pass.*

Griffin v. U.S., 336 U.S. 704 (1949) 24

Massachusetts v. M'Pike, 57 Mass. 181 (1849) . . . 21

Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527 (2009) . . . . . 5, *pass.*

Ohio v. Roberts, 448 U.S. 56 (1980) 22

People v. Giles, 152 P.3d 433 (Cal. 2007) 14

Reg. v. Megson, et al., 173 Eng. Rep. 894 (1840) . . 21

Rex v. Foster, 172 Eng. Rep. 1261 (1834) 21

State v. Crawford, 54 P.3d 656, 658 (2002) 25

State v. Hill, 578 A.2d 370, 375 (N.J. 1990) 24

Thompson v. Trevanion, 90 Eng. Rep. 179 (1694) 21

U.S. v. Napier, 518 F.2d 316 (9th Cir. 1975) 24

United States v. Inadi, 475 U.S. 387 (1986) 11

Other Authorities

John Henry Wigmore *Evidence* (Chadbourne rev. 1974) 20, 22

Ben Trachtenberg, *Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 Hastings L.J. 581 (1996) 22

Kenneth S. Broun, 2 *McCormick on Evidence* (6th Ed. 2006) 25

T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 Iowa L. Rev. 499 (1999) 20

Thomas Y. Davies, *Not "The Framer's Design": How the Framing-Era Ban Against Hearsay Evidence Refutes The Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J. L. Policy 349 (2007) 20

Tom Harbison, *Crawford v. Washington and Davis v. Washington's Originalism: Historial Arguments Showing Child Abuse Victims' Statements to Physicians Are Nontestimonial and Admissible as an Exception to the Confrontation Clause*, 58 Mercer L.Rev. 569 (2010) 22

INTEREST OF THE AMICI CURIAE

Crawford v. Washington, 541 U.S. 36 (2003), with its progeny, has redefined the parameters of admissible evidence under the Confrontation Clause of the Sixth Amendment to the Constitution. Lower courts have reached divergent opinions as to what constitutes a testimonial statement under the guidelines set forth in this Court's opinion in the companion cases of *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006). This case presents the Court with an opportunity to clarify what constitutes a "testimonial" statement made by a witness.

The amici states have a significant interest in the resolution of this issue. At stake is whether a statement made by a witness *in extremis* in the immediate context of a traumatic event is necessarily "testimonial" simply because it was made to a police officer and phrased in the past tense. The position of the Michigan Supreme Court was essentially that any remark made to a government official in the past tense was "testimonial" under *Hammon*. It is important for this Court to clarify that a statement made under circumstances far removed – at least from the declarant's perspective – from a formal interview for purposes of trial is not "testimonial" and does not violate the Confrontation Clause.

STATEMENT

1. On April 29, 2001, Detroit police responded to a report of a shooting and found a car idling in the parking lot of a filling station; the car's operator, Anthony Covington, lay on the ground next to the still-open driver's side door, bleeding profusely from a

gunshot wound to his torso. (J.A. 7, 11). In response to the police inquiry "what happened?" (J.A. 19). Covington, in obvious and severe distress, told police that his neighbor "Rick," later identified as the Respondent, Richard Bryant, shot him through the back door of Bryant's house a few blocks away. (J.A. 12-13). Covington told police that the shooting had transpired within the last half hour. (J.A. 39). Covington had managed to drive away from the scene of the shooting and had made it as far as the gas station. (J.A. 23). After making these statements to the police on the scene, Covington was taken to a nearby hospital by ambulance. He died from his wounds a few hours later. (Pet. App. at 10a).

Police called for backup and went to the house Covington had described, and there found ample evidence that someone had, indeed, been shot on the porch through the door. (Pet. App. at 10a, 17a). Bryant, however, was not in the house when police arrived. He was arrested a year later in California and extradited to stand trial in Michigan. The first trial resulted in a hung jury; a second trial resulted in convictions for second-degree murder and various firearm charges. *Id.*

2. Bryant's counsel initially moved to suppress the statement Covington made on hearsay grounds. At a preliminary hearing, the State proffered that the statement was admissible both as an "excited utterance" and as a "dying declaration." The State called police witnesses to the stand to describe the circumstances under which the statement was made. Before the prosecution had presented direct evidence regarding Covington's knowledge of his own fatal condition, the court stated that it was satisfied that the

statement was admissible under the "excited utterance" exception to the hearsay rule. Bryant's trials were conducted prior to this Court's decision in *Crawford*.

3. Bryant appealed his convictions to the Michigan Court of Appeals, challenging the admission of Covington's remarks. After two trips through the appellate system – during which time this Court issued its holdings in *Crawford* and *Davis* – the Michigan Supreme Court ruled that Covington's statements were admitted in violation of the Confrontation Clause. The court found that "the only issue" was whether the statements were made "under circumstances objectively indicating that the primary purpose of the [police] interrogation was to . . . meet an 'ongoing emergency,'" and thus would be nontestimonial under *Davis*, or whether "the primary purpose of this interrogation was to establish or prove past events potentially relevant to later criminal prosecution," and therefore would be inadmissible testimonial hearsay. (Pet. App. at 16a). The court observed that the behavior of the police at the gas station did not indicate they believed that the shooter was nearby; rather, the court said, the police behaved as if "there was no present or imminent criminal threat," *id.* at 17a, because they did not [take] up a defense position" or "call[] for backup" at the gas station, instead going to, and calling for backup at, the house where the shooting occurred. *Id.*

Notwithstanding the fact that the police were called to the gas station to respond to a report of a shooting victim, and that they stayed with Covington until EMS arrived, the Michigan court ruled that "[t]he police were at the gas station to investigate a past

crime, not to prevent an ongoing one, and the victim was not "speaking about events *as they were actually happening*, as in *Davis*, but was 'describing past events,' as in *Crawford* and *Hammon*." *Id.* at 17a, *quoting Davis*, 547 U.S. at 827 (alterations omitted). The court held that there was no "ongoing emergency," seeming to find that for Confrontation Clause purposes, a criminal emergency was only "ongoing" while the actual actus reus of the crime was being performed, and that the emergency ended the moment the criminal act was completed. (Pet. App. at 19a-20a). Accordingly, it reversed the lower courts and found that the admission of the statement was error. Michigan petitioned this Court for writ of certiorari.

SUMMARY OF ARGUMENT

A. The statement of the declarant Covington was not "testimonial" in the *Crawford* sense, and hence was not introduced in violation of Bryant's Sixth Amendment rights. A statement made by a shooting victim as he lay dying on the parking lot of a gas station is far removed from the formal depositions taken by "Marian magistrates," or even the orderly police interrogations conducted in *Crawford* and *Hammon*. The Michigan court's focus on whether the statement was rendered in the past or present tense is misguided. The determination of whether a statement is "testimonial" or not ultimately hinges upon the circumstances under which the statement is made. *Crawford* and its progeny indicate that the question to be asked is not whether the statement was presented in the past or present tense, but whether the statement resembles the "formal" statement to a "magistrate" that the Confrontation Clause was meant to bar – in the words of *Davis*, whether the parties, questions, and answers

"align[] . . . with their courtroom analogues." 547 U.S. at 828.

Under this analysis, Covington's statement plainly was not "testimonial." While the statement was made to government agents, the police officers who asked him what had happened were attempting to address an ongoing emergency, not collecting testimony for later use. The circumstances under which the statement was made were not "formal," "solemn," calm, or safe. The police were not acting as "magistrates," but as first responders to an emergency; the declarant was not acting as a "witness," but as a shooting victim seeking aid.

The Michigan Supreme Court incorrectly assumed that a statement is "testimonial" unless it fits within a very narrow and sharply circumscribed set of circumstances. It failed to consider the principles behind this Court's analyses of interrogations in *Davis* and *Hammon*, which curtail this expansive definition of "testimonial."[1] The reality is that statements ordinarily are not "testimonial" unless they are in some sense "formal statements" specifically intended to constitute evidence against the accused. The Confrontation Clause was meant to preclude courts or the government – through statute, common law, or evidentiary rule – from convicting criminal defendants on the basis of the *formal* ex parte statements of witnesses who were never called to testify at trial. Most narrowly, the Clause prohibits the abuses of the Marian bail and committal statutes, which allowed

---

[1] This Court's decision in *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527 (2009), was issued two weeks after the Michigan court filed its opinion in the instant case.

into evidence statements taken from witnesses by justices of the peace after an accused had been arrested for a felony. This Court has recognized that for Sixth Amendment purposes, an unsworn, unrecorded statement to a government official should fare no better than a sworn, recorded one, and that a formal interview by an investigating police officer should be treated as the functional equivalent of a formal committal hearing by a Marian justice of the peace. This does not mean, however, that any statement heard by any government official is barred by the Confrontation Clause, as was made plain by this Court's ruling in *Davis*. The statement against Bryant was made by a distraught, indeed dying, gunshot victim, in the immediate aftermath of the assault. There was nothing formal about the statement or its circumstances. The remarks were not intended to substitute for trial testimony. Covington was not speaking as a "witness," but as a person in need of assistance. The police officers who elicited his statement were not acting in their roles as investigators and agents of the prosecution; they were acting as first responders addressing an ongoing emergency. The statement undoubtedly is hearsay – but it is not and was never meant to be "testimony."

B. Indeed, Covington's statement would have been admissible in 1791 under the res gestae exception, which confirms the "nontestimonial" result of a valid *Crawford* analysis. Exceptions to the common law right of confrontation existed when the Sixth Amendment was drafted. By the late 18th and early 19th centuries, criminal courts recognized a limited exception for spontaneous declarations as a part of the res gestae – the "thing done." Covington's statement was

admissible under that theory. The proper question, for Sixth Amendment purposes, is not whether the statement is reliable, but whether it is "testimonial." Statements that were admissible under Framing-era res gestae analysis were not admitted because of their inherent reliability; they were admissible because they were nontestimonial. A statement that is part of the thing done is akin to a "verbal act," such as the statements of coconspirators in the furtherance of a conspiracy, and therefore is not meant to be "testimony" against anyone. Thus, an historical analysis of the admissibility of Covington's statement reaches the same result as an analysis limited strictly to the *Crawford* concept of "testimony" – a spontaneous statement in the context of an ongoing emergency is not barred by the Confrontation Clause. Therefore, the Michigan Supreme Court was in error when it found the statement inadmissible.

ARGUMENT

In *Crawford*, this Court established that the Confrontation Clause of the Sixth Amendment barred the admission of "testimonial" hearsay. In *Davis*, this Court specifically addressed whether statements made to police in the context of an active, ongoing emergency were "testimonial," and concluding that they were not, allowed the admission of such statements. As the State of Michigan argues in its brief, the statement in the instant case was made during an ongoing emergency and the Supreme Court of Michigan therefore erred in finding it to be an inadmissible testimonial statement.

This brief sets forth two additional bases for reversing the Michigan Supreme Court. First, this

Court has repeatedly stressed that statements must bear sufficient "indicia of formality" to be testimonial, and must be intended as a "substitute for trial testimony." The statements in this case were plainly lacking in formality and were not intended to substitute for live testimony. These principles underlie the examination of interrogations the Court undertook in *Davis*, and it is these principles – not merely the mechanical determination that there was some sort of question asked by a government official – that guide and inform a proper Sixth Amendment analysis.

Second, this Court frequently has noted that some historic exceptions to the common-law right of confrontation predate the framing of the Sixth Amendment, and that these exceptions are at least partially incorporated into the Confrontation Clause. The statement in the instant case constituted a res gestae "spontaneous declaration" that was accepted as an exception to the right of confrontation at the time of the drafting of the Sixth Amendment. An historical analysis of this exception demonstrates that at its root, it parallels the testimonial/nontestimonial analysis set forth in *Crawford* and its progeny. A true res gestae spontaneous declaration is a part of the "thing done" and not "testimonial" at all. Thus, under the facts presented here, the trial court's finding that this constituted an "excited utterance" was correct. As such, the statement was nontestimonial and admissible without violating the Confrontation Clause.

A. The statement was not testimonial because there was no indication of any formality surrounding its making, and there was no sign that it was intended to substitute for trial testimony.

1. In *Crawford* and its progeny, this Court required some level of formality and an intent to "substitute" for trial testimony for a statement to be deemed "testimonial." The Michigan court's failure to consider these factors at all led to the erroneous determination that the statements here were "testimonial" hearsay. A review of the facts makes it plain that Covington's statement was neither formal nor intended to substitute for courtroom testimony.

In *Crawford*, this Court held that by its language, the Clause applies only to "those who 'bear testimony.'" It defined testimony as "a solemn declaration" and observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford*, 541 U.S. at 51 (citations omitted). The Court then noted that "various formulations" of the "core class of 'testimonial' statements" included

> ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior

> testimony, or confessions, [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

541 U.S. at 51-52 (citations omitted). Thus, *Crawford* itself mentioned formality (and "solemnity") as an element in determining the testimonial nature of a statement, an element entirely consistent with the constitutional imperative to avoid the use of evidence similar to "Marian examinations."

Without question, moreover, the statement at issue in *Crawford* was "formal" and intended to serve as a substitute for trial testimony. Sylvia Crawford's testimony included almost every possible modern counterpart to a Marian examination: it was made in response to formal questioning by police officers, at a police station, several hours after a suspect had been arrested, and was intended to exonerate the defendant Michael Crawford. 541 U.S. at 38.

The Court's subsequent analysis of "testimonial" versus "nontestimonial" statements in the combined cases of *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006), is consistent with this concern about formality. Although the Court focused on the differing circumstances of the interrogations in *Davis* and *Hammon*, it did not disregard the requirement of formality mentioned in *Crawford*. The *Davis* Court held that the fact that a statement to police was not recorded verbatim did not render it so "informal" as to evade the Clause. *Id.* at 826. However, the Court held, in order to be "testimonial" in the Sixth Amendment sense of the term, the statement must nonetheless

have some indicia of formality and "solemnity" to bring it within the rubric of "testimonial," consistent with the definition of "witness against" set forth in *Crawford*.

The facts and circumstances of the interrogations in *Davis* and *Hammon* are consistent with this distinction between "formal" and "informal" statements. Michelle McCottry's statements to a 911 operator were to a "government official" in *Davis*, but the remarks were in no way "formal." In calling 911 for assistance, McCottry plainly did not intend her statements as "a weaker substitute for trial testimony[,]" 547 U.S. at 828, quoting *United States v. Inadi*, 475 U.S. 387, 394 (1986). The Court noted that while Sylvia Crawford's questioning and resulting statement had, like that of Lord Cobham in Sir Walter Raleigh's trial, "aligned perfectly with their courtroom analogues," 547 U.S. at 828, McCottry's did not. "No 'witness' goes into a courtroom to proclaim an emergency and seek help." *Id.* Under the circumstances – the remarks were made during and immediately after a domestic assault by Davis, McCottry's former boyfriend – there was no indication of "formality" or "solemnity" such that the questions of the 911 operator and the responses of the witness could be deemed to be intended substitutions for "testimony" to be used in a formal legal proceeding. A formal legal proceeding was the last thing in McCottry's mind; Davis, who was the subject of a domestic violence protective order, had assaulted her, and she was seeking help. Gathering evidence for use at trial was not the objective of the 911 operator; she was responding to an ongoing emergency. A statement made during an ongoing emergency such as the one in

Davis lacks any indicia of formality, and is not testimonial; thus the statement was properly admitted.

The facts of *Hammon* provided a contrast and a means of illustrating the distinction between the "nontestimonial" statements of McCottry and the "testimonial" statements collected by the police in their capacity as investigators. When the police initially arrived on the scene, Amy Hammon "appear[ed] somewhat frightened," but told police that "nothing was the matter." 547 U.S. at 819. This Court noted that there was "no emergency in progress." *Id.* at 830. Ms. Hammon made a statement inculpating her husband in acts of violence against her only after police had arrived on the scene, removed Hershel Hammon from the room, and engaged in a formal interrogation of her concerning her husband's behavior. *Id.* at 819. After eliciting a statement from her, the police officer – who testified that he separated the Hammons and questioned Amy Hammon so he could "investigate what had happened" – had Ms. Hammon complete a "battery affidavit." *Id.* at 820.

Acknowledging that "the *Crawford* interrogation was more formal," *id.*, this Court nonetheless found that under the facts and circumstances of *Hammon*, the oral statement and affidavit were "testimonial" and could not be admitted unless Amy Hammon were present for cross-examination. "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Id.* Indeed, the majority, while finding sufficient "formality" in *Hammon* to render the statement "testimonial," nonetheless recognized that the formal nature of the statement was a critical

element in determining whether a statement was "testimonial." *See id.* at 827 (noting the "striking" difference in "the level of formality" between Sylvia Crawford's recorded statement and Michelle McCottry's 911 call); *id.* at 830 (acknowledging that Crawford's statement was "more formal" than Hammon's).

The specific circumstances of the statements in *Davis* required this Court to examine McCottry's and Hammon's "interrogations," but it was the degree of "formality" that helped determine whether the remarks were intended as a "substitute for trial testimony." Formal interrogation is, indeed, a strong indicator that a statement is an intended substitute for live testimony.[2] In the differing results of *Hammon* and *Davis*, this Court established two points on a spectrum which would seem to bracket the dividing line between a formal, Marian-style interrogation and an informal statement not intended as "testimony" and therefore not barred by the Confrontation Clause.[3]

---

[2] There may be a small number of "formal" statements which are nonetheless admissible. In *Davis*, 547 U.S. at 825 n.3, and again in *Melendez-Diaz*, 129 S.Ct. at 2539 n.8 (2009), this Court approved of the result of *Dowdell v. United States*, 221 U.S. 325 (1911), which denied a Sixth Amendment challenge to the introduction of affidavits from court officials concerning the conduct of the trial below. There, the Court held that the affidavits dealt with "collateral matters . . . not concerning [the defendants'] guilt or innocence," and so did not violate the Confrontation Clause. 221 U.S. at 330.

[3] This Court was not unanimous on the question of whether the interview in *Hammon* fell on the "inadmissible" side of that dividing line. In an opinion concurring with the judgment in *Davis* but dissenting from the judgment in

In *Giles v. California*, ___ U.S. ___, 128 S.Ct. 2678 (2008), two separate concurrences addressed the requirement of formality when that issue was not even before the Court. In *Giles*, the remark was a tearful statement to a police officer responding to a report of an assault and death threat made by Giles against his former girlfriend, Brenda Avie. *People v. Giles*, 152 P.3d 433, 436-437 (Cal. 2007). The parties stipulated below that the statements in question were "testimonial." Justice Thomas nonetheless would have found that "the police questioning was not 'formalized dialogue'" and therefore the statements "do not implicate the Confrontation Clause." 128 S.Ct. at 2693 (Thomas, J., concurring). Justice Alito separately noted that "the Confrontation Clause does not apply to out-of-court statements unless it can be said that they are the equivalent of statements at trial made by 'witnesses.' It is not at all clear that Ms. Avie's

---

Hammon, Justice Thomas agreed that under *Crawford*, "testimonial" statements "require some degree of solemnity[.]" 547 U.S. at 837 (Thomas, J., concurring).

> Interactions between the police and an accused (or witness) resemble Marian proceedings – and the[ ] early [American confrontation] cases – only when the interactions are somehow rendered "formal." In *Crawford*, for example, the interrogation was custodial, taken after warnings given pursuant to *Miranda* . . . This imports a solemnity to the process that is not present in a mere conversation between a witness or suspect and a police officer.

Id. (citations omitted). The concurrence agreed, however, that the affidavit Amy Hammon later wrote at the request of the police was "inadmissible per se[.]" *Id.* at 840 n.5.

statement falls within that category." *Id.* at 2694 (Alito, J., concurring).

This Court also referred to both formality and substitution in its decision in *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527 (2009). There, the statements at issue were affidavits prepared by police chemists. After repeating *Crawford*'s application of the Confrontation Clause to "formalized testimonial materials," 129 S.Ct. at 2531, this Court noted that the affidavits were "functionally identical to live, in-court testimony," intended by all concerned to serve as direct evidence at trial. *Id.* The *Melendez-Diaz* Court distinguished the chemist affidavits at issue from admissible business records on the same "substitution" grounds – records which are "prepared specifically for use at petitioner's trial" are inadmissible under the Clause. *Id.* at 2540.

Reading *Crawford*, *Davis*, *Giles*, and *Melendez-Diaz* together, it is plain that the category of "testimonial" hearsay is meant to be narrow, and generally applies only to statements that are (a) formal, mirroring the sort of statements that would be given in a courtroom setting; and (b) given to a government official acting in an investigatory capacity. These requirements provide a means of determining whether a statement was intended to be a "substitute for trial testimony." The setting, purpose, and form of an official interrogation which elicited the statement are useful, and perhaps in some cases dispositive, means of determining whether a statement has "sufficient indicia of formality" and similarity to courtroom testimony to constitute the sort of unconfronted "testimony" allowed by the Marian statutes and barred by the Sixth Amendment. But the

requirements behind the test are critical for determining if the Confrontation Clause applies. A mechanical assessment of the grammar of a police officer's questions will not necessarily yield the correct result.

2. The decision of the Michigan Supreme Court in the instant case essentially ignores the "formality" and "substitution" requirements. While observing that this Court had ruled that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not," (Pet. App. at 12a, quoting *Crawford*, 541 U.S. at 51), the court thereafter focused exclusively on the "interrogation" by the police without examining the principles underlying this Court's decisions on the issue. Asking a shooting victim "what happened?" is an ambiguous, informal interrogation, and assessing it as though it were identical to the interrogations of *Crawford*, *Davis*, and *Hammon* without applying the underlying principles leads to a decision that is inconsistent with the purpose of the Sixth Amendment.

The Michigan court's blinkered approach to the facts here was in error, since it is "the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate[,]" *Davis*, 547 U.S. at 822 n.1; *see also Melendez-Diaz*, 129 S.Ct. at 2535 ("a person who volunteers his testimony" without any police interrogation is still "a witness against the defendant" under the Confrontation Clause).

It is not dispositive that the statement in question was heard by a government official, or was rendered in

the past tense, or was preceded by a police officer asking "what happened." The fundamental question is whether the statement itself is "testimony" – a statement made to a government official acting in anticipation of future prosecution, with such indicia of formality that one can infer an intent to create a "substitute for trial testimony." This determination is based upon the totality of the facts and circumstances surrounding the interrogation and statement.[4] The Michigan Supreme Court's refusal to consider the extremely informal nature of Covington's statement, and the concomitant lack of any indication that his statement was meant to be a "substitute" for trial testimony, paved the way for its erroneous conclusion that the statement was barred by the Confrontation Clause.

The Michigan court noted that Covington "made these statements while he was surrounded by five police officers and knowing that emergency medical services was on the way." (Pet. App. at 16a). However, rather than recognizing that this rendered the statements far less formal than those in *Davis* and *Hammon* (to say nothing of the highly formal statements in *Crawford*) – thus removing them farther

---

[4] The circumstances of the interrogation itself obviously would be among the "indicia of formality." If the questions were asked by police officers acting in their capacity as crime investigators, or by prosecutors in the course of their professional duties, it would weigh heavily toward finding a statement "testimonial." *Hammon, supra.* By contrast, a prosecutor who happened upon the scene of a recent shooting on her way home from work would not be presumed to be developing testimony for use at trial if she asked the victim "what happened?"

from being a "substitute for trial testimony" – the Michigan court focused almost exclusively on the grammatical tense of the statements to reach its conclusion that the statements were "testimonial" without ever considering if the remarks were the sort of "solemn" substitute for courtroom testimony that the Confrontation Clause prohibits. (Pet. App. at 16a).

The statement in this case is utterly lacking the indicia of formality that this Court has found to be a critical element in determining whether or not a statement is a modern analog of the examination of witnesses conducted by a Marian justice of the peace at a committal proceeding. There is nothing in the facts of this case which would indicate that Covington reasonably believed his response to the inquiry "what happened?" to be a substitute for trial testimony. The Michigan's court's fixation on grammatical tense and the subsequent actions of the police was misplaced.

B. An excited utterance was historically recognized as not falling within the right of confrontation, and is not "testimonial."

1. In *Crawford* and later cases, this Court has looked to Framing era practices to help determine when hearsay evidence may be admitted consistent with the Confrontation Clause. Thus, in *Crawford* the Court noted that dying declarations, although "testimonial," may well be admissible as an exception to the Confrontation Clause, as such statements were admissible at the time the Bill of Rights was adopted. *Crawford*, 541 U.S. at 56 n.6; *Giles*, 128 S.Ct. at 2682-2683. In *Melendez-Diaz*, the Court observed that what is now called the "business records" exception predated the Confrontation Clause and retains its vitality. 129

S.Ct. at 2538. And in *Giles*, the Court affirmed the existence, and delineated the contours, of the forfeiture-by-wrongdoing exception to the Clause based on Framing era practices. 128 S.Ct. at 2691. Like dying declarations, business records, and the testimony of witnesses whose absence the defendant procured, "spontaneous exclamations" – excited utterances – were also recognized hearsay exceptions at the end of the eighteenth century.

Each of these exceptions has its own historical justification. Dying declarations were testimonial, but admissible because they were functionally sworn. The forfeiture rule was based on principles of equity. Business records and excited utterances, by contrast, were admissible because they were considered nontestimonial. Business records were not created to substitute for trial testimony. Indeed, records that were prepared in anticipation of litigation do not fall within the exception. And excited utterances were considered part of the res gestae, *i.e.*, part of the act itself, not a separate statement. Neither business records nor excited utterances was sworn, and therefore would have failed an 18th-century test for "reliability." But neither was "testimony," and therefore the common-law right of confrontation did not attach.

The distinction between "testimonial" dying declarations, on the one hand, and business records and res gestae statements, on the other, is based upon the original basis for excluding hearsay – its unsworn nature. Prior to the mid- to late-eighteenth century, the chief criticism of hearsay statements was that they were not under oath. *Crawford*, 541 U.S. at 70 (Rehnquist, C.J., concurring). As legal historian

Thomas Gallanis explained, "[f]or early [treatise] writers, such as Gilbert, Bathurst, and Buller, hearsay lacked credibility because the original statement was not made under oath." T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 Iowa L. Rev. 499, 533 (1999).

Therefore, under a Framing-era analysis, dying declarations, uttered by a witness "immediately going into the presence of his Maker," *Wright*, 497 U.S. at 820 (1990), were admissible because they were "functionally sworn." Thomas Y. Davies, *Not "The Framer's Design": How the Framing-Era Ban Against Hearsay Evidence Refutes The Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J. L. Policy 349, 354 (2007). They were not, of course, "functionally cross-examined," yet this lack of confrontation was not regarded as an obstacle to their admission.[5]

By contrast, a spontaneous exclamation (or business record entry) would not have been considered "functionally sworn." Prior to the development of modern "reliability" analysis, the admissibility of the unsworn and unconfronted excited utterance rested upon the fact that it was treated, as the term res

---

[5] Compare Marian examinations, which also were sworn yet unconfronted.

gestae indicates, as a verbal "act."[6] "Res gestae" may be translated as "acts" – that is, not speech.

This Court has previously recognized that excited utterances have been deemed admissible for at least two hundred years. *White*, 502 U.S. at 355 n.8. Historic examples of the admission of res gestae remarks, including what would now be known as excited utterances, include *Thompson v. Trevanion*, 90 Eng. Rep. 179 (1694) (allowing a remark made immediately after being assaulted); *Aveson v. Kiniard*, 102 Eng. Rep. 1258 (1805) (allowing a statement about the declarant's then-present good health); and *Rex v. Foster*, 172 Eng. Rep. 1261 (1834) (allowing the statement of a pedestrian who was killed by a passing coach, made immediately after being struck). *But see Reg. v. Megson, et al.*, 173 Eng. Rep. 894 (1840) (disallowing a report of a rape made upon the victim's return home). An early American example is *Massachusetts v. M'Pike*, 57 Mass. 181 (1849), which began with the statement: "The admission in evidence of the statement of the party injured, as to the cause and manner of the injury which terminated in her death, may be sustained upon the ground, that the testimony was of the nature of the *res gestae*." *Id.* at 184.

2. The admissibility of res gestae statements at common law had little to do with their "reliability" as testimony, and thus did not constitute the merger of

---

[6] The other res gestae exceptions were similarly admitted as acts, not testimony, such as a statement of a co-conspirator in the furtherance of the conspiracy, defamatory remarks, or the making of a contract. 6 John Henry Wigmore *Evidence* §1768 (Chadbourne rev. 1974).

hearsay reliability analysis and confrontation rights implied in *Ohio v. Roberts*, 448 U.S. 56 (1980), and repudiated in *Crawford*. Indeed, just the opposite. In the eighteenth and early nineteenth centuries, "reliability" required an oath or its functional equivalent. Res gestae statements were admitted because the statements were deemed a part of the "thing done" – not a formal statement at all. Theories for the reliability of hearsay came along later.

The development of modern hearsay rules occurred around the same time as the drafting of the Sixth Amendment; "[b]y the close of the eighteenth century, the contours of the modern rule against hearsay were largely in place." Gallanis, 84 Iowa L. Rev. at 535. This included what would later become known as the "res gestae" exceptions. *Id.* at 537. *See also* Ben Trachtenberg, *Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 Hastings L.J. 581, 591 (1996) (noting that "an enforceable Hearsay Rule akin to its modern incarnation" developed late in the seventeenth century); Tom Harbison, *Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians Are Nontestimonial and Admissible as an Exception to the Confrontation Clause*, 58 Mercer L.Rev. 569,600 (2010) (observing that the holding in *Davis* is consistent with a Framing-era res gestae or spontaneous declaration analysis).

Wigmore discussed the "spontaneous exclamation" res gestae exception at length, 6 John Henry Wigmore *Evidence* §1745 *et seq.* (1974 Chadbourne Rev.). He considered the "spontaneous declaration" (and its related extensions) to be essentially the only genuine

hearsay contained under the term "res gestae." *Id.* at §1746. Most of the traditional res gestae exceptions, he noted, were not hearsay at all in the modern sense – the statements were not presented for the truth of the matter asserted, but as verbal acts. *Id.* at §1766 *et seq.*[7]

When the res gestae exceptions – like business records, not uttered for use at trial – are considered in their historic role (and separated from the modern "reliability" analysis), it is evident that their admissibility was rooted in their "nontestimonial" nature. A statement that is a part of the "thing done" is not testimonial. It is not uttered for use in litigation. It is comparable to a verbal act. Thus, the statement of a co-conspirator in furtherance of a conspiracy is admissible without prior cross-examination, not because it is reliable, but because the act of the statement itself is evidence of a crime. *See Crawford*, 541 U.S. at 59 n.9 (noting that statements introduced "for purposes other than establishing the truth of the matter asserted" are admissible under the Clause). The same holds true of a spontaneous declaration made while still affected by "the pain or hurt received" by the criminal act. Harbinson, *id.* at 602.

---

[7] Wigmore also considered the "present sense impression" to be one of the "res gestae" exceptions. While not before the Court in this case, a statement made evincing the declarant's then-existing state of being ordinarily would not seem to be "testimonial" in the *Crawford/Davis* sense – it would rarely be "formal," and unlikely to be meant as a "substitute for trial testimony." Thus, whether one applied Framing-era res gestae analysis or *Crawford*'s "testimonial/non-testimonial" analysis, the outcome would ordinarily be the same.

It is important to note that while a modern gloss on the "excited utterance" is that it must be made while the declarant is too emotionally upset to formulate a conscious falsehood, this approach to the statement seems to be drawn from the "reliability" analysis used to justify various modern hearsay exceptions. Under this theory, statements which are not part of "the thing done" could be admitted provided that the declarant was shown to be upset at the time of the statement. *See United States v. Napier*, 518 F.2d 316 (9th Cir. 1975) (allowing admission of a statement made by a witness seven weeks after she was assaulted by the defendant, triggered by her "great distress" upon seeing the defendant's picture in a newspaper). A Framing-era analysis of an excited utterance as part of the res gestae would necessarily focus much more upon the proximity in time between the act and the statement; while a victim may become too upset to formulate a falsehood seven weeks after the fact, her statement would nonetheless not be a part of the "thing done."[8]

3. Although "res gestae" properly has been repudiated as an analytical approach to hearsay,[9] *see*

---

[8] At least one other eighteenth century hearsay exception is consistent with the notion that the statement must be made while in distress from the act itself. The "hue and cry" of a crime victim, substantively admissible until the early 19th century, must have been raised immediately after the assault. *See State v. Hill*, 578 A.2d 370, 375 (N.J. 1990).

[9] Over sixty years ago this Court considered the use of the term res gestae "a veil for obscurity of thought." *Griffin v. U.S.*, 336 U.S. 704, 709 n.2 (1949), quoting 1 Wigmore, *Evidence*, §111 (3d Ed., 1940).

Kenneth S. Broun, 2 *McCormick on Evidence* §268 (6th Ed. 2006), it serves as a useful, historically sound basis for harmonizing the *Crawford* testimonial/nontestimonial approach with the understanding of the right to confrontation that existed around the time the Sixth Amendment was adopted. The parallel between a Framing-era res gestae analysis and a *Crawford* "testimonial" analysis is borne out by the Court's decisions which involved a determination of the testimonial nature of an out-of-court statement. In *Crawford* and *Hammon* this Court found that the various out-of-court statements in question were "testimonial." None of these statements would qualify as "excited utterances." In *Crawford*, the witness was taken to a police station, Mirandized, and interrogated twice, several hours apart. *State v. Crawford*, 54 P.3d 656, 658 (2002). (It was the second recorded statement to which Crawford primarily objected.) This Court found the statement to be "testimonial under any definition," *Crawford*, 541 U.S. at 61, and held it was barred by the Confrontation Clause. Sylvia Crawford's statement plainly was not an "excited utterance" made in such close connection with the act itself as to constitute an admissible res gestae statement under a Framing-era analysis.

Amy Hammon's statement to the police was similarly made at a point removed in time from the act itself, and although she appeared "somewhat frightened," she assured police that "nothing was the matter" before making the testimonial statement to them. *Davis*, 547 U.S. at 819. This Court found the statement to be nontestimonial, and from the record presented, there is nothing to indicate that this

statement would have been a res gestae "excited utterance."

In contrast, the statements of Michelle McCottry in *Davis* were found to be nontestimonial and admissible; they were also clearly "excited utterances" made in close relation to the events themselves. *Id.* at 817-818. They only ceased to be spontaneous declarations when the 911 operator interrupted McCottry's narrative discourse and directed McCottry to "stop talking and answer my questions." *Id.* at 818.[10]

It should be noted that in *Giles*, as discussed *supra*, it is at least arguable that the statement Avie made would have qualified as an "excited utterance" if it was made close on the heels of the assault while still suffering from its effects. In *Giles* the State had conceded that the statements were "testimonial," 128 S.Ct. at 2682, but the concurring opinions of Justice Thomas, *id.* at 2693, and Justice Alito, *id.* at 2694, both questioned whether the statement was "testimonial."

The trial judge in this case found Covington's statement to be admissible as an "excited utterance." The statement was made by Covington as he lay dying in the parking lot of a gas station, bleeding from a gunshot wound to his torso, minutes after the shooting. Under even the most conservative definition of an excited utterance, this would qualify as part of the res gestae of the shooting itself. To the Framers, this

---

[10] The Court specifically declined to address the admissibility of these later remarks; the Washington Supreme Court had found any error in their admission to be harmless. *Davis*, 547 U.S. at 829.

finding would have meant that the statement was an "act" so closely tied to the events in question as to form a part of the events. It would have been, in a word, "nontestimonial."

The *Crawford/Davis* "testimonial" analysis and an historical "spontaneous declaration"/res gestae analysis reach the same result because they are, fundamentally, describing the same phenomenon: a statement that is not meant to serve as a "substitute for trial testimony," but is rather a part of the act. Whether one applies the *Crawford* analysis to determine whether this statement fit within the narrow category of "testimonial" statements, or whether one applies a Framing-era analysis to determine if the statement was a part of the "thing done," the result is the same. The Michigan court's focus was too narrow and its concept of "testimonial" statements too broad. Its decision should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Michigan Supreme Court should be reversed.

Respectfully submitted.

DOUGLAS F. GANSLER
Attorney General of Maryland
ROBERT TAYLOR, JR.*
Assistant Attorney General
200 St. Paul Place
Baltimore, MD 21202
(410) 576-6419
Counsel for amicus curiae

* Counsel of Record

May 7, 2010

AMICUS CURIAE BRIEF

No. 09-150

IN THE

Supreme Court of the United States

STATE OF MICHIGAN,
Petitioner,

v.

RICHARD PERRY BRYANT,
Respondent.

On Writ of Certiorari to the Supreme Court of Michigan

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

BARBARA E. BERGMAN
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
CO-CHAIR, NACDL AMICUS COMMITTEE
UNM School of Law
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-3304

ROBERT K. KRY
Counsel of Record
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2011
rkry@mololamken.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether statements to investigating police officers accusing someone of a crime and describing the offense after it has been completed fall outside the scope of the Confrontation Clause merely because the suspect remains at large or the declarant has been injured.

TABLE OF CONTENTS

	Page
Question Presented	i
Interest of *Amicus Curiae*	1
Summary of Argument	2
Argument	3
I. A Statement's Testimonial Status Should Depend on Its Evidentiary Purpose, Not Its Formality	3
A. Confrontation Disputes Historically Involved Formal, Sworn Testimony Because Other Legal Doctrines Made It Unnecessary To Address Confrontation Issues Outside That Context	4
B. The Evidentiary-Purpose Standard Is More Consistent With Framing-Era Law Than the Formality Standard	9
C. This Court's Cases Support the Evidentiary-Purpose Standard	13
II. Covington's Statements Were Testimonial Because They Were Made To Provide Evidence in a Criminal Investigation	16
A. The Fact That a Potentially Dangerous Offender Remained at Large Did Not Make Covington's Accusations Non-Testimonial	17
B. Covington's Need for Medical Care Did Not Render His Accusations Non-Testimonial	23

TABLE OF CONTENTS—Continued

Page

III. Covington's Accusations Are Not Exempt As Excited Utterances or *Res Gestae* 24

A. There Was No *Res Gestae* or Excited Utterance Exception at Framing-Era Common Law 24

B. The Nineteenth-Century *Res Gestae* Exception Does Not Support the State's Position 27

Conclusion 31

TABLE OF AUTHORITIES

Page

CASES

Aveson v. *Kinnaird*, 6 East 188, 102 Eng. Rep. 1258 (K.B. 1805) 29

Bambridge's Case, 17 How. St. Tr. 397 (1730) 26

Binns v. *State*, 57 Ind. 46 (1877) 28, 29

Brigham City v. *Stuart*, 547 U.S. 398 (2006) 18

Carmell v. *Texas*, 529 U.S. 513 (2000) 22

Collier v. *State*, 13 Ark. 676 (1853) 20, 21

Commonwealth v. *McPike*, 57 Mass. (3 Cush.) 181 (1849) 29, 30

Crawford v. *Washington*, 541 U.S. 36 (2004) ..... *passim*

Davis v. *Washington*, 547 U.S. 813 (2006) .... *passim*

Enos v. *Tuttle*, 3 Conn. 247 (1820) 28

Fenwick's Case:

13 How. St. Tr. 537 (H.C. 1696) 6, 10, 22

A Compleat Collection of State-Tryals 232 (Salmon ed., 1719) 6

Insurance Co. v. *Mosley*, 75 U.S. 397 (1869) 29, 30

John's Case (1790), in 1 Edward Hyde East, *A Treatise of the Pleas of the Crown* 357 (1803) 27

Jones v. *State*, 71 Ind. 66 (1880) 28

King v. *Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779) 7

TABLE OF AUTHORITIES—Continued

Page

King v. *Drummond*, 1 Leach 337, 168 Eng. Rep. 271 (1784) 26

King v. *Ely* (1720), in 12 Charles Viner, *A General Abridgment of Law and Equity* 118 (c. 1757) 26

King v. *Eriswell*, 3 T.R. 707, 100 Eng. Rep. 815 (K.B. 1790) 10

King v. *Flemming*, 2 Leach 854, 168 Eng. Rep. 526 (1799) 7

King v. *Lambe*, 2 Leach 552, 168 Eng. Rep. 379 (1791) 8

King v. *Radbourne*, 1 Leach 457, 168 Eng. Rep. 330 (1787) 26

King v. *Westbeer*, 1 Leach 12, 168 Eng. Rep. 108 (1739) 10

King v. *Woodcock*, 1 Leach 500, 168 Eng. Rep. 352 (1789) 26

Mayes v. *State*, 1 So. 733 (Miss. 1887) 28, 29

Melendez-Diaz v. *Massachusetts*, 129 S. Ct. 2527 (2009) 15, 23

New York v. *Quarles*, 467 U.S. 649 (1984) 18

People v. *Ah Lee*, 60 Cal. 85 (1882) 28, 29

People v. *Restell*, 3 Hill 289 (N.Y. Sup. Ct. 1842) 17, 20

People v. *Wong Ark*, 30 P. 1115 (Cal. 1892) 28

Raleigh's Case:

2 How. St. Tr. 1 (1603) 6, 21, 22, 27

David Jardine, *Criminal Trials* (1832) 21, 22, 27

TABLE OF AUTHORITIES—Continued

Page

Regina v. *Bedingfield*, 14 Cox Crim. Cas. 341 (1879) 27, 28

Respublica v. *Langcake*, 1 Yeates 415 (Pa. 1795) 27

Rex v. *Clarke*, 2 Stark. 241, 171 Eng. Rep. 633 (1817) 26

Rex v. *Foster*, 6 Car. & P. 325, 172 Eng. Rep. 1261 (1834) 29

Rex v. *Pain*, Comb. 358, 90 Eng. Rep. 527 (K.B. 1697) 17

Rex v. *Reason & Tranter*, 1 Strange 499, 93 Eng. Rep. 659 (K.B. 1722) 26

Showalter v. *W. Pac. R. Co.*, 106 P.2d 895 (Cal. 1940) 28

State v. *Campbell*, 30 S.C.L. (1 Rich.) 124 (App. L. 1844) 20

State v. *Carlton*, 48 Vt. 636 (1876) 28

State v. *Davidson*, 30 Vt. 377 (1858) 28

State v. *Estoup*, 1 So. 448 (La. 1887) 28

State v. *Hill*, 20 S.C.L. (2 Hill) 607 (App. L. 1835) 19, 20, 21

State v. *Moody*, 3 N.C. (2 Hayw.) 31 (Super. L. & Eq. 1798) 27

State v. *Pomeroy*, 25 Kan. 349 (1881) 28

Case of Thatcher & Waller, T. Jones 53, 84 Eng. Rep. 1143 (K.B. 1676) 17

Thompson v. *Trevanion*:
Skin. 402, 90 Eng. Rep. 179 (K.B. 1693) 25, 26, 28, 29

TABLE OF AUTHORITIES—Continued

Page

Holt 286, 90 Eng. Rep. 1057 (K.B. 1693) 25

Tinckler's Case (1781), in 1 Edward Hyde East, *A Treatise of the Pleas of the Crown* 354 (1803) 26

United States v. *Gabe*, 237 F.3d 954 (8th Cir. 2001) 23

United States v. *McGurk*, 26 F. Cas. 1097 (C.C.D.C. 1802) (No. 15,680) 27

United States v. *Veitch*, 28 F. Cas. 367 (C.C.D.C. 1803) (No. 16,614) 27

Welbourn's Case (1792), in 1 Edward Hyde East, *A Treatise of the Pleas of the Crown* 358 (1803) 27

White v. *Illinois*, 502 U.S. 346 (1992) 11

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. VI 2

Fed. R. Evid. 803(4) 23

1 & 2 Phil. & M., c. 13 (1554) 7, 17

2 & 3 Phil. & M., c. 10 (1555) 7, 17

13 Eliz., c. 1 (1571) 6

13 Car. 2, c. 1 (1661) 6

TREATISES

Matthew Bacon, *A New Abridgment of the Law* (1736) 5, 26

Henry Bathurst, *The Theory of Evidence* (1761) 5, 25

TABLE OF AUTHORITIES—Continued

Page

William Blackstone, *Commentaries on the Laws of England*:
(1st ed. 1768) 5, 10, 15
(9th ed. 1783) 7

Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (1772) 5, 25

Richard Burn, *The Justice of the Peace and Parish Officer*:
(1st ed. 1755) 5, 7, 19
(8th ed. 1764) 25

Joseph Chitty, *A Practical Treatise on the Criminal Law* (1816) 7, 19

William D. Evans, *On the Law of Evidence*, in 2 Robert J. Pothier, *A Treatise on the Law of Obligations or Contracts* app. 16, at 141 (1806) 27

Geoffrey Gilbert, *The Law of Evidence*:
(1st ed. 1754) ..... *passim*
(Lofft ed., 1791) 24

Matthew Hale, *The History and Analysis of the Common Law of England* (1713) 5, 10

Matthew Hale, *The History of the Pleas of the Crown* (1736) 7, 19

William Hawkins, *A Treatise of the Pleas of the Crown*:
(1st ed. 1721) ..... *passim*
(Leach 6th ed. 1787) 24

John Morgan, *Essays upon the Law of Evidence, New Trials, Special Verdicts, Trials at Bar, and Repleaders* (1789) 10

TABLE OF AUTHORITIES—Continued

Page

William Nelson, *The Law of Evidence* (1717) 25

Thomas Peake, *A Compendium of the Law of Evidence* (1801) 6, 25

S.M. Phillipps, *A Treatise on the Law of Evidence* (1814) 27

David Power, *Roscoe's Digest of the Law of Evidence in Criminal Cases* (5th ed. 1861) 29

Thomas Starkie, *A Practical Treatise on the Law of Evidence* (1824) 8, 26, 27

Francis Wharton, *A Treatise on the Law of Evidence in Criminal Issues* (9th ed. 1884) 28, 29

Thomas Wood, *An Institute of the Laws of England* (9th ed. 1763) 10

OTHER AUTHORITIES

Black's Law Dictionary (9th ed. 2009) 27

Davies, *Not "The Framers' Design,"* 15 J.L. & Pol'y 349 (2007) 12, 25

Edward Edwards, *The Life of Sir Walter Ralegh* (1868) 22

Fisher, *What Happened—and What Is Happening—to the Confrontation Clause*, 15 J.L. & Pol'y 587 (2007) 28

Friedman & McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171 (2002) 28

Kry, *Confrontation Under the Marian Statutes*, 72 Brook. L. Rev. 493 (2007) 6, 10

TABLE OF AUTHORITIES—Continued

Page

John H. Langbein, *Prosecuting Crime in the Renaissance* (1974) 17

Letter from James Madison to Thomas Mann Randolph (Jan. 13, 1789), in 11 *The Papers of James Madison* 415 (Rutland *et al.* eds., 1977) 9

Thomas B. Macaulay, *The History of England* (London 1855) 22

William Stebbing, *Sir Walter Ralegh: A Biography* (1899) 22

Noah Webster, *An American Dictionary of the English Language* (1828) 11, 13

IN THE

Supreme Court of the United States

No. 09-150

STATE OF MICHIGAN,

Petitioner,

v.

RICHARD PERRY BRYANT,

Respondent.

On Writ of Certiorari to the Supreme Court of Michigan

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 States, including private criminal defense lawyers, public defenders, and law professors.[1] NACDL was founded in 1958 to promote study in the field of

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, and its counsel made such a contribution.

criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and to ensure that criminal proceedings are conducted in a proper and fair manner.

NACDL has a keen interest in this case. A defining hallmark of the common-law criminal trial was vigorous adversarial testing through cross-examination. To this day, cross-examination remains a singularly effective means of exposing bias, uncovering error, and unmasking fabrication. To preserve that prized feature of common-law procedure, the Framers guaranteed every citizen accused of a crime the right "to be confronted with the witnesses against him." U.S. Const. amend. VI.

Over the past century, that right was seriously eroded by the proliferation of hearsay exceptions. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), this Court sought to reinvigorate the right. The degree to which it will succeed, however, depends critically on how courts define the class of "testimonial" statements to which that decision applies. Given NACDL's mission to ensure fairness in criminal trials by preserving defendants' traditional means to contest the charges against them, NACDL has a substantial interest in that question.

SUMMARY OF ARGUMENT

Half an hour after he was shot, Anthony Covington told investigating police officers who had shot him and recounted the events leading up to the shooting. The court below properly held those accusations testimonial. Covington made the statements "to enable the police to identify, locate, and apprehend the perpetrator." Pet. App. 16A. Those are paradigmatic testimonial state-

ments. None of the State's contrary arguments withstands scrutiny.

I. The State contends that the statements were insufficiently "formal." This Court should now make clear, however, that a statement's testimonial status depends on its evidentiary purpose—*i.e.*, on whether the statement, objectively viewed, was made to provide evidence in a criminal investigation or prosecution. Formality matters only to the extent it sheds light on that purpose.

II.A. The State also insists that the fact the suspect was still at large constituted an "emergency" that rendered the accusations non-testimonial. But that theory is impossible to square with framing-era law. Arrest warrant applications were routinely made when a dangerous offender was on the loose, yet they were inadmissible on confrontation grounds. Moreover, the great political trials like Raleigh's and Fenwick's involved emergencies no less pressing than the one here.

II.B. Nor did Covington's need for medical care render his statements non-testimonial. His accusations went far beyond any medically relevant matters to such things as the shooter's identity and the preceding events. He provided that information to assist a police investigation, not to seek medical care.

III. Finally, *amici*'s suggestion that the statements should be admitted as "excited utterances" or "*res gestae*" lacks merit. Those hearsay exceptions did not exist at the framing, and the doctrines that emerged in the nineteenth century would not have applied here.

ARGUMENT

I. A Statement's Testimonial Status Should Depend on Its Evidentiary Purpose, Not Its Formality

Crawford interpreted the Confrontation Clause to impose strict limits on the admission of "testimonial" statements against criminal defendants. *Crawford* v. *Wash-*

ington, 541 U.S. 36, 68 (2004). The Court noted three possible definitions for that class of statements. Two focused on evidentiary purpose, while the third focused on formality. Compare *id.* at 51 ("'similar pretrial statements that declarants would reasonably expect to be used prosecutorially'"); and *id.* at 52 ("'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'"); with *id.* at 52 ("'formalized testimonial materials'"). The Court found it unnecessary to select among them because the statements at issue qualified under any definition. See *id.* at 52. This Court's more recent cases have likewise considered both evidentiary purpose and formality without definitively resolving the relationship between the standards. See pp. 13-15, *infra*.

In this case, the State urges the Court to deem Covington's accusations non-testimonial because they were not sufficiently formal. The case thus presents an opportunity for the Court to clarify the relevance of formality. For the reasons below, the Court should hold that a statement's testimonial status depends on its evidentiary purpose—*i.e.*, on whether the statement, objectively viewed, was made to provide evidence in a criminal investigation or prosecution. Formality should be relevant only to the extent it sheds light on that purpose.

A. Confrontation Disputes Historically Involved Formal, Sworn Testimony Because Other Legal Doctrines Made It Unnecessary To Address Confrontation Issues Outside That Context

Formality played an important role at common law, but as a *requirement* of admissibility, not a factor whose absence improved admissibility. Testimony had to be given in a solemn, formal manner, and the principal attribute of formality the law insisted upon was an oath. As Gilbert put it: "[I]n a Court of Justice, * * * all

Things [a]re determined under the Solemnities of an Oath * * * ." Geoffrey Gilbert, *The Law of Evidence* 108 (1754); see also 2 William Hawkins, *A Treatise of the Pleas of the Crown* 434 (1721) ("Evidence for the King must in all Cases be upon Oath * * * .").

A corollary was the rule against hearsay. Sworn testimony that someone else had made an unsworn statement was no better than the unsworn statement itself. See Gilbert (1754), *supra*, at 107-08. Framing-era law was thus clear: "Hearsay is no Evidence." *Id.* at 107. And the most common justification was that out-of-court statements lacked the "Solemnities of an Oath." See *id.* at 107-08; 2 Hawkins (1721), *supra*, at 431; 2 Matthew Bacon, *A New Abridgment of the Law* 313 (1736); 1 Richard Burn, *The Justice of the Peace and Parish Officer* 292 (1755); Henry Bathurst, *The Theory of Evidence* 111 (1761); Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 289-90 (1772).[2] The hearsay rule was thus directed to unsworn, out-of-court statements, and it excluded such statements because they lacked the requisite formality.

By contrast, confrontation rhetoric ("confront," "face to face," "presence," etc.) was almost invariably invoked in the context of formal, sworn testimony. Blackstone and Hale extolled the "confronting of adverse witnesses" as an advantage of common-law over civil-law trial procedure. 3 William Blackstone, *Commentaries on the Laws of England* 373 (1768); see Matthew Hale, *The History and Analysis of the Common Law of England* 252, 258 (1713). Treason statutes required witnesses to testify under oath against the defendant "face to face" at his

---

[2] Some framing-era treatises also justified the rule against hearsay on a second ground: that hearsay deprived the defendant of an opportunity to cross-examine the declarant. See 2 Hawkins (1721), *supra*, at 431; 2 Bacon, *supra*, at 313; 1 Burn (1755), *supra*, at 292.

arraignment. *E.g.*, 13 Eliz., c. 1, § 9 (1571); 13 Car. 2, c. 1, § 5 (1661). Defendants in high-profile trials such as *Fenwick's Case* objected to testimony sworn in their absence because "our constitution is, that the person shall see his accuser." 13 How. St. Tr. 537, 592 (H.C. 1696) (Shower). Hawkins cited that case for the point that "in Cases of Life no Evidence is to be given against a Prisoner but in his Presence." 2 Hawkins (1721), *supra*, at 428 & n.a (citing 4 *A Compleat Collection of State-Tryals* 232, 277, 310 (Salmon ed., 1719)). And the admissibility of sworn Marian depositions came to depend on whether "the prisoner [was] present." *E.g.*, Thomas Peake, *A Compendium of the Law of Evidence* 40-41 (1801); see Kry, *Confrontation Under the Marian Statutes*, 72 Brook. L. Rev. 493 (2007). Those sources involved *sworn* testimony—evidence that met the common-law requirements of formality.[3]

That historical focus does not prove that unsworn, informal testimony was unobjectionable on confrontation grounds. Rather, the absence of formality would simply have rendered confrontation a moot point. Such statements were clearly inadmissible for lack of formality, so there was no need to consider whether they violated confrontation principles too. As the late Chief Justice put it: "Without an oath, one usually did not get to the second step of whether confrontation was required." *Crawford*, 541 U.S. at 71 (Rehnquist, C.J., concurring in judgment). Unsworn hearsay was "no Evidence," Gilbert (1754), *supra*, at 107, so principles governing how "evidence" must be given were largely pretermitted.

---

[3] One glaring exception is *Raleigh's Case*: Raleigh repeatedly objected on confrontation grounds even though Cobham's examination was unsworn. See 2 How. St. Tr. 1, 15-16, 19, 23 (1603); *id.* at 16 (examination "never subscribed nor avouched"—*i.e.*, unsigned and unsworn); *Crawford*, 541 U.S. at 52 & n.3.

The broader legal context supports the conclusion that informality rendered confrontation principles moot, not inapplicable. As already explained, a fundamental tenet was that testimony had to be given under the "Solemnities of an Oath." Gilbert (1754), *supra*, at 108; pp. 4-5, *supra*. Given that organizing principle of common-law evidence, no one would have thought statements that differed from sworn testimony only in that they *lacked* necessary formality should have a privileged evidentiary status. The informality could only have made the evidence *more* objectionable, not less.

The formality of an oath was required in many contexts. Marian depositions of accusing witnesses were admissible only if sworn. See 2 Hawkins (1721), *supra*, at 429; 2 Matthew Hale, *The History of the Pleas of the Crown* 52, 284 (1736). Formerly, child witnesses were sometimes allowed to testify without oath, but that exception was eliminated before the framing. See *King* v. *Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202, 202 (1779) (reported 1789/1815); 4 William Blackstone, *Commentaries on the Laws of England* 214 (9th ed. 1783). Early English law may actually have prohibited defendants from swearing their witnesses, but that rule was abolished too. See 2 Hawkins (1721), *supra*, at 434. The clear trend was thus to insist on, not dispense with, formality.

While the oath was the most important formality, others were required too. The Marian statutes explicitly mandated that examinations be "put in writing." 1 & 2 Phil. & M., c. 13, § 1 (1554); 2 & 3 Phil. & M., c. 10, § 1 (1555); see 2 Hale (1736), *supra*, at 284; 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 79 (1816) ("absolutely necessary"). And, at least under pre-framing authority, they had to be "subscribed"—*i.e.*, signed. See 2 Hawkins (1721), *supra*, at 429; 1 Burn (1755), *supra*, at 287-88; but see *King* v. *Flemming*, 2 Leach 854, 855, 168 Eng. Rep. 526, 526-27 (1799). Such formalities

were not required of the defendant's *own* examination, but only because a defendant's own statements—even oral ones—were always admissible against him. See *King* v. *Lambe*, 2 Leach 552, 554-60, 168 Eng. Rep. 379, 379-83 (1791) (reported 1800).

As authorities explained, formality could only help a statement's admissibility. *Lambe* observed:

> [S]urely, if what a man says, though not reduced into writing, may be given in evidence against him, *a fortiori* what he says, when reduced into writing, is admissible; for the fact confessed being rendered less doubtful by being reduced into writing, it is of course [e]ntitled to greater credit; and it would be absurd to say, that an instrument is invalidated by a circumstance from which it derives additional strength and authenticity: and for this reason it is clear, that the present confession having been taken by a magistrate under a judicial examination, can be no objection to receiving it in evidence, *for it gains still greater credit in proportion to the solemnity under which it was made.*

2 Leach at 555, 168 Eng. Rep. at 380 (emphasis added); see also 1 Thomas Starkie, *A Practical Treatise on the Law of Evidence* 274 (1824) (stating in a discussion of civil cases that, where unsworn statements would fall into a hearsay exception, a sworn *ex parte* deposition containing them would be admissible "*à fortiori*").

Given that legal context, it would have been highly anomalous to exempt statements from confrontation requirements solely for lack of formality. The dearth of direct evidence of the confrontation right's application to informal statements is thus plainly better explained on the ground that informality rendered confrontation principles moot—not inapplicable.

B. The Evidentiary-Purpose Standard Is More Consistent With Framing-Era Law Than the Formality Standard

That dearth of direct evidence, coupled with the modern erosion of the hearsay rule, makes it necessary to estimate "what the Framers might have intended had [hearsay] been liberally admitted as substantive evidence like it is today." *Crawford*, 541 U.S. at 71 (Rehnquist, C.J., concurring in judgment). This Court's duty is to make that "estimation as accurate as possible." *Id.* at 52-53 n.3 (majority opinion). The "evidentiary purpose" standard provides a reasonably accurate estimate. The "formality" standard does not.

1. Both standards cover the sworn *ex parte* testimony for which we have direct evidence of original meaning. But the formality standard excludes all other statements—even those that differ from sworn testimony only in that they lack the formality the common law required. The broader legal landscape makes clear that the Framers would have viewed such statements as inferior to sworn testimony. See pp. 4-8, *supra*. It is irrational to assume they would have exempted such statements from confrontation requirements *because* of that additional defect. Common-law formality requirements may have deprived us of much direct evidence of the confrontation principle's application to informal, unsworn testimony, but "there is no doubt what its application would have been." Cf. *Crawford*, 541 U.S. at 52-53 n.3.

That the Framers did not entrench common-law formality requirements in the Sixth Amendment does not mean they thought those requirements unimportant. As Madison explained, the Bill of Rights sought to protect "all those essential rights, *which have been thought in danger*." Letter from James Madison to Thomas Mann Randolph (Jan. 13, 1789), in 11 *The Papers of James Madison* 415, 416 (Rutland *et al.* eds., 1977) (emphasis

added). It was natural for the Framers to entrench a confrontation right when faced with competing civil-law regimes organized around *ex parte* testimony. See 3 Blackstone (1768), *supra*, at 373; Hale (1713), *supra*, at 252, 258. By contrast, no real-world legal regime was based on unsworn hearsay. Further, controversies over aspects of the confrontation right persisted throughout the eighteenth century.[4] But the last high-profile trial based on *unsworn* testimony may have been almost 200 years old. See p. 6 n.3, *supra*.

The Framers thus most likely entrenched the confrontation right, but not the formality requirement, because the former seemed more in need of protection. Of course, that does not mean courts should read a formality requirement into the Constitution. But it supports the inference that the Framers would not have exempted from confrontation requirements statements that differ from sworn testimony only in that they lack formality.

Two arguments are typically invoked to support the formality standard, but neither is ultimately persuasive.

---

[4] By far, the most significant framing-era source of "testimonial" evidence was committal depositions taken under the Marian statutes and their state equivalents. Those examinations were normally taken in the prisoner's presence and thus did not ordinarily infringe confrontation rights. See Kry, *supra*, at 512-27. Even so, there was debate throughout the eighteenth century over whether they would be admissible if not so taken. Contrast *Fenwick's Case*, 13 How. St. Tr. at 596 (Sloane), with *id.* at 602 (Musgrave); see *King* v. *Westbeer*, 1 Leach 12, 12, 168 Eng. Rep. 108, 109 (1739) (reported 1789); Thomas Wood, *An Institute of the Laws of England* 671 (9th ed. 1763); 1 John Morgan, *Essays upon the Law of Evidence, New Trials, Special Verdicts, Trials at Bar, and Repleaders* 431 (1789); contrast *King* v. *Eriswell*, 3 T.R. 707, 713-14, 100 Eng. Rep. 815, 819 (K.B. 1790) (Buller, J.), with *id.* at 710 n.(c), 100 Eng. Rep. at 817 n.(c) (reporter's note 1797); Kry, *supra*, at 495-97 & nn.11-13, 512-27, 530-41. Marian coroners' depositions, while less common, raised confrontation issues of their own. See Kry, *supra*, at 546-47.

One is that, because confrontation objections were historically made in the context of formal testimony, the Clause's coverage should be so limited. See, *e.g.*, *White* v. *Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part). As already explained, however, the historical focus is ambiguous because it is also consistent with another hypothesis: that common-law formality requirements made it unnecessary to reach confrontation issues outside the context of formal testimony. That does not mean the Framers would have exempted informal statements had they had occasion to consider the matter.

The second argument is dictionary-based. *Webster's* defined "testimony" (and by extension "witness") as "[a] *solemn* declaration or affirmation made for the purpose of establishing or proving some fact. Such affirmation in judicial proceedings, may be verbal or written, but must be under oath." 2 Noah Webster, *An American Dictionary of the English Language* (1828) (emphasis added). Webster's reference to solemnity was entirely natural given that his purpose in writing a dictionary definition was to *describe* testimony, and testimony is normally solemn because that is how the law requires it to be given. (Hence also the second sentence's reference to an oath.) But it reads too much into a dictionary definition to assume the Framers would have exempted *ex parte* testimony from the Confrontation Clause merely because it had the *additional* defect of informality.

2. While the formality standard thus fits poorly with framing-era law, the evidentiary-purpose standard—*i.e.*, statements made for the purpose of providing evidence in a criminal investigation or prosecution[5]—is a reasonable

---

[5] For obvious practical reasons, this standard is typically phrased objectively—*i.e.*, what a reasonable person in the declarant's position would have intended rather than the declarant's subjective intent.

estimate of how the Framers would have applied confrontation principles to unsworn hearsay had they had occasion to do so. Because sworn testimony is essentially always given for an evidentiary purpose, the evidentiary-purpose standard—like the formality standard—covers the sworn testimony for which we have direct evidence of the confrontation principle's application. Unlike the formality standard, however, the evidentiary-purpose standard also covers statements that differ from *ex parte* sworn testimony only in that they lack the formality whose absence would have rendered them even more objectionable. It covers the sworn affidavits of the reviled civil-law regime and the unsworn accusations that would not have passed muster even in France.

Conversely, the evidentiary-purpose standard leaves untouched hearsay whose relationship to sworn testimony is less clear: business records, statements in furtherance of a conspiracy, off-hand comments to neighbors, and so on. One could argue—and it has been argued—that the Framers would have objected to those statements on confrontation grounds too. See Davies, *Not "The Framers' Design,"* 15 J.L. & Pol'y 349, 425-34 (2007).[6] But that inference is much weaker. Unsworn statements made for non-evidentiary purposes are qualitatively different from, not just inferior to, sworn testimony. A clerk making an entry in a business ledger is not acting as a "witness against" someone in any ordinary sense of the term.

See, *e.g.*, *Crawford*, 541 U.S. at 51-52; *Davis* v. *Washington*, 547 U.S. 813, 822 (2006).

[6] The linchpin of Professor Davies' argument is that, because the hearsay rule was justified in part on cross-examination grounds, see p. 5 n.2, *supra*, any violation of that rule also would have been seen as a violation of the confrontation right. See Davies, *supra*, at 425-34. That may be a possible inference, but it is not a necessary one.

Even under the evidentiary-purpose standard, formality may be relevant: It may shed light on the declarant's evidentiary intent. That a speaker was put on oath, for example, shows convincingly that his purpose was to provide evidence. But where that evidentiary intent is otherwise established, mere lack of formality should not render a statement non-testimonial. An accuser who purposefully provides evidence against a defendant in a criminal proceeding is a "witness against" him, and it defies common sense to suppose that the accusation's admissibility could be improved if, rather than being delivered under oath in all the formal trappings of a courtroom, it were phoned in unsworn to the court clerk while the declarant was having breakfast at a coffee shop.

C. This Court's Cases Support the Evidentiary-Purpose Standard

This Court's cases are consistent with the foregoing principles. *Crawford*, for example, held statements to an interrogating police officer testimonial under either an evidentiary-purpose or a formality standard. 541 U.S. at 51-52. It cited *Webster's* for the proposition that testimony is "typically" a solemn declaration, but did not hold that lack of formality would exempt statements where evidentiary purpose was otherwise apparent. See *id.* at 51. And it specifically rejected a limitation to *sworn* testimony, finding it "implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK." *Id.* at 52-53 & n.3. That observation is true of other attributes of formality as well.

Davis v. *Washington*, 547 U.S. 813 (2006), likewise focused on evidentiary purpose. The case's specific holding was that statements in response to interrogation are testimonial if made "to establish or prove past events potentially relevant to later criminal prosecution" but not if made "to enable police assistance to meet an ongoing

emergency." *Id.* at 822.[7] The Court thus allowed McCottry's 911 call because it was "a call for help against a bona fide physical threat" while excluding Amy Hammon's statements because they concerned "an investigation into possibly criminal past conduct." *Id.* at 827, 829. Like *Crawford*, moreover, *Davis* cautioned against overreliance on formality, stating that "the protections of the Confrontation Clause can[not] readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition." *Id.* at 826. That is simply another manifestation of the more general principle that statements should not be exempted for lack of formality where evidentiary purpose is otherwise shown.

While *Davis* addressed formality at points, it did so to shed light on evidentiary purpose. It cited the informality of McCottry's 911 call to support its conclusion that the call's "primary purpose was to enable police assistance to meet an ongoing emergency." 547 U.S. at 827-28. And it analyzed the formality of Hammon's statements to ascertain whether "the purpose of the exercise was to nail down the truth about past criminal events." *Id.* at 830. Both passages are consistent with the principle that formality matters to the extent it informs evidentiary purpose. See p. 13, *supra*.

Moreover, the factors the Court considered as bearing on formality actually seem more relevant to evidentiary purpose. The Court deemed Hammon's statements "for-

---

[7] Although *Davis* referred broadly to the "purpose of the interrogation," it made clear that "the declarant's statements," not "the interrogator's questions," are ultimately what matter. 547 U.S. at 822-23 & n.1. That must be so: Statements made unwittingly to an undercover police officer, for example, are non-testimonial even if elicited for an evidentiary purpose. See *Crawford*, 541 U.S. at 58. Of course, an officer's *objectively manifested* purpose may bear on the respondent's intent.

mal enough" because they were made "in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'" 547 U.S. at 830. Those factors seem more relevant to whether the speaker was providing evidence in a criminal investigation, not "formality" as such. Elsewhere, the Court described McCottry's 911 call as informal because it was "frantic" and the circumstances "not tranquil." *Id.* at 827. But those factors were also directly relevant to her lack of evidentiary intent because they confirmed that her statements were "a call for help against a bona fide physical threat." *Ibid.*[8]

Most recently, in *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009), the Court explicitly relied on the statements' "evidentiary purpose." *Id.* at 2532. It also considered their formality. See *ibid.* But, as in *Crawford*, the statements qualified under either standard, so the Court did not address whether lack of formality would exempt statements whose evidentiary purpose was otherwise clear. See *ibid.*

The Court should now explicitly hold what its prior cases suggest and what the historical record compels: A

---

[8] Admittedly, in a footnote responding to the dissent, the Court indicated it was "not disput[ing]" the necessity of formality, although it opined that the requirement would be met by the mere fact that false reports are criminal offenses. See 547 U.S. at 830-31 n.5; cf. *id.* at 826-27. But that oblique footnote was hardly part of the case's holding. Throughout the rest of the opinion, the Court treated formality as bearing on evidentiary purpose. Further, it makes little sense to exempt statements from confrontation requirements solely because a State chooses not to criminalize false reports. At common law, an *oath* mattered in part precisely because it authorized prosecution for perjury. See 4 Blackstone (1769), *supra*, at 136-37. The theory that States can evade confrontation rights by decriminalizing false reports is thus just a variation on the already-rejected theory that States can evade confrontation rights by interrogating witnesses unsworn. See *Crawford*, 541 U.S. at 52-53 & n.3.

statement's testimonial status depends on whether it was made to provide evidence in a criminal investigation or prosecution. Formality may shed light on that purpose, but where a statement's evidentiary purpose is otherwise clear, no lack of formality can redeem it.

II. Covington's Statements Were Testimonial Because They Were Made To Provide Evidence in a Criminal Investigation

The court below correctly held Covington's statements testimonial. It identified the proper evidentiary-purpose standard from *Davis*. Pet. App. 15A. And it correctly applied that standard to these facts.

As the court noted, Covington "told the police that defendant shot him about 30 minutes earlier at defendant's house, which was about six blocks away, and that he drove himself to the gas station." Pet. App. 15A-16A. "These statements related solely to events that had occurred in the past and at a different location." *Id.* at 16A. Given those circumstances, the statements' primary purpose was "to enable the police to identify, locate, and apprehend the perpetrator." *Ibid.* The statements, in other words, were made *as evidence* in a criminal investigation—to provide a basis for official action, the arrest of a suspected offender. Where a person accuses someone of a crime and describes the offense to responding police officers after the crime has been completed, the statements are testimonial, because any reasonable person in those circumstances would understand he was providing that information to further a police investigation and to procure the apprehension of the perpetrator.

That Covington presumably did not intend his statements as evidence *for trial* is immaterial. The confrontation right historically applied to the use at trial of statements originally made for pretrial investigative or prosecutorial purposes, not just evidence generated for trial. Marian committal depositions were taken when deciding

whether to bail or commit a prisoner pending trial, and coroners' depositions were taken during an investigation into a cause of death; in both cases, use as evidence at trial was a possibility, but not the purpose. See 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 Phil. & M., c. 10 (1555); John H. Langbein, *Prosecuting Crime in the Renaissance* 5-54 (1974).[9] This Court has regularly deemed it sufficient that statements are made to provide evidence in a *criminal investigation or prosecution*, even if not intended specifically for trial. See, *e.g.*, *Davis*, 547 U.S. at 830 (statements "for use in [the officer's] 'investigat[ion]'"); *id.* at 829, 830-31 & n.5, 832 n.6; *Crawford*, 541 U.S. at 53. Any reasonable person in Covington's position would have understood he was furnishing information to help the police investigate a crime and bring the offender to justice. That is a quintessential evidentiary purpose.

The State offers essentially two arguments in response. But neither has merit.

A. The Fact That a Potentially Dangerous Offender Remained at Large Did Not Make Covington's Accusations Non-Testimonial

Relying on *Davis*, the State urges that the fact the suspect was still at large when Covington made his statements constituted an "ongoing emergency" that ren-

---

[9] In fact, historical controversies over testimony taken specifically *for trial* were relatively rare. The common law recognized a form of deposition to preserve evidence for trial—the "deposition *de bene esse*"—but such depositions were inadmissible in criminal cases for lack of statutory authority. See *People* v. *Restell*, 3 Hill 289, 294-99 (N.Y. Sup. Ct. 1842); *Case of Thatcher & Waller*, T. Jones 53, 53-54, 84 Eng. Rep. 1143, 1143 (K.B. 1676); cf. *Rex* v. *Pain*, Comb. 358, 358-59, 90 Eng. Rep. 527, 527 (K.B. 1697). That is why confrontation disputes typically involved depositions taken for pretrial investigatory or prosecutorial purposes, for which such authority *did* exist, in the form of the Marian statutes.

dered the statements non-testimonial. But the State misreads *Davis*. That case did not establish an all-purpose "emergency" exception to the Confrontation Clause. Rather, the ongoing emergency mattered there because it bore on the declarant's evidentiary intent: It made McCottry's statements a "call for help against a bona fide physical threat" rather than a narrative of past criminal conduct designed to further a police investigation. 547 U.S. at 827. By contrast, the fact that a dangerous offender is at large and needs arresting, even if an "emergency" in some sense, does not undermine the declarant's evidentiary intent. A particularly pressing criminal investigation is still a criminal investigation, and accusers who make statements to further it are "witnesses" under the Sixth Amendment. That in no way impugns the police for responding to the "emergency" the way they did here; it simply requires the prosecution to afford an opportunity for cross-examination if it later decides to introduce the witness's accusations at the defendant's trial. See *id.* at 832 n.6.[10]

The State's proposed expansion of *Davis* is flatly contrary to the historical record. That an accusing witness gave a statement to help identify and apprehend a dangerous offender has never justified exempting it from the Confrontation Clause.

---

[10] That the circumstances might qualify as an "emergency" under *Miranda*'s public-safety exception, *New York* v. *Quarles*, 467 U.S. 649, 655-58 (1984), or the Fourth Amendment's exigent-circumstances exception, *Brigham City* v. *Stuart*, 547 U.S. 398, 403-07 (2006), is irrelevant. Those contexts involve inquiries into the overall reasonableness of police conduct, and an emergency matters because it strengthens the State's interest in expeditious action. Here, an emergency is relevant for the entirely different reason that it *sometimes* disproves the declarant's intent to assist a criminal investigation. And when the only "emergency" is a criminal on the loose who needs arresting, it does not disprove that intent at all.

1. The State's theory is impossible to square with the framing-era treatment of arrest warrant applications. In addition to their Marian committal duties, justices of the peace had authority to issue arrest warrants based on probable cause that a crime had been committed. See 2 Hawkins (1721), *supra*, at 84-86; 2 Burn (1755), *supra*, at 508-10. Justices normally took the examination of the party applying for the warrant under oath and in writing. See 2 Hale (1736), *supra*, at 111; 2 Burn (1755), *supra*, at 508. Those warrant applications thus resembled Marian committal depositions: Both were essentially sworn narratives of the defendant's guilt. Cf. 1 Chitty, *supra*, at 80. But they differed in a key respect: Because warrant applications sought to authorize an arrest, rather than to commit a suspect already arrested, they were necessarily taken in the suspect's absence.

If the State's "emergency" theory were good law, those warrant applications would have been routinely admitted in framing-era criminal trials. The whole point of applying for an arrest warrant was to procure the apprehension of a dangerous criminal still on the loose. The applications were sworn and in writing, so there was no defect of formality. They were a routine feature of common-law criminal procedure, so there was no shortage of cases where the issue would arise. And they were a gold mine of incriminating evidence, as the facts justifying arrest are typically the same ones justifying conviction. Despite all that, *amicus* has not found a single reported case where a court admitted an arrest warrant application against a criminal defendant. In the two cases where prosecutors even attempted the strategy, the evidence was soundly rejected on confrontation grounds.

In *State* v. *Hill*, 20 S.C.L. (2 Hill) 607 (App. L. 1835), the court considered a "deposition given in evidence [that] was made on the application for a warrant to arrest the prisoner, and in his absence." *Id.* at 608. It noted

that *committal* depositions were admissible "if the accused is present and has an opportunity of cross examining the witness." *Id.* at 609. But it refused to extend that rule to warrant applications because they were *ex parte*:

> [N]o rule would be productive of more mischief than that which would allow the *ex parte* depositions of witnesses, and especially in criminal cases, to be admitted in evidence. Charges for criminal offences are most generally made by the party injured, and under the influence of the excitement incident to the wrong done, and however much inclined the witness may be to speak the truth, and the magistrate to do his duty in taking the examination, his evidence will receive a coloring in proportion to the degree of excitement under which he labors, which the judgement may detect, but which it is impossible exactly to describe, and we know too how necessary a cross examination is to elicit the whole truth from even a willing witness; and to admit such evidence without the means of applying the ordinary tests, would put in jeopardy the dearest interests of the community.

Id. at 610-11. *Hill* was a thoroughly reasoned and influential early American decision on the confrontation right. See, *e.g.*, *People* v. *Restell*, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842) (citing *Hill* for the point that "the original complaint on oath before the magistrate on applying for the warrant * * * was [n]ever received in evidence"); *State* v. *Campbell*, 30 S.C.L. (1 Rich.) 124, 130-31 (App. L. 1844) (the leading American case on coroners' depositions; relying heavily on *Hill*). This Court cited *Hill* in both *Crawford* and *Davis*. 541 U.S. at 50; 547 U.S. at 824 n.3.

The same point recurred in *Collier* v. *State*, 13 Ark. 676 (1853). The trial court there had admitted "the affidavit of [a witness], taken before a justice of the peace, * * * to the effect that the prisoner, on the day previous,

assaulted and wounded him with a knife, *and praying a warrant for his apprehension*," as well as a deposition taken the same day. *Id.* at 677 (emphasis added). The state supreme court reversed. The testimony, it held, was "altogether objectionable" because it was given, not when the prisoner was "brought before the committing magistrate," but rather when he "was not present, [and] was in another part of the country, and had not then been arrested." *Id.* at 678. The evidence "violat[ed] the spirit of his constitutional right to be * * * confronted with the witnesses against him." *Ibid.* That decision, like *Hill*, is irreconcilable with the State's position.

The analogy to arrest warrant applications is strong on these facts. Covington told law-enforcement authorities about a past crime for the purpose of enabling the apprehension of its perpetrator. That is *exactly* what a framing-era witness would do in seeking an arrest warrant. The primary difference is that warrant applications were typically sworn depositions or affidavits while the accusations here were unsworn oral statements, but the Court has already held such differences immaterial. See *Crawford*, 541 U.S. at 52-53 & n.3. The analogy between Covington and a warrant applicant is at least as strong as the analogy between Sylvia Crawford and a Marian committal deponent. See *id.* at 52-53. Covington's accusations were inadmissible for the same reason.

2. The State's theory also collides with the treason trials that helped inspire the Confrontation Clause, which involved "emergencies" far more pressing than the one here. *Raleigh's Case*, for example, involved an alleged conspiracy with Spanish forces to overthrow the government and install Arabella Stuart in the King's place. See 2 How. St. Tr. 1, 1-3 & n.* (1603); 1 David Jardine, *Criminal Trials* 389-99 (1832). A number of suspects were apprehended and examined over several days as the Crown tried to ascertain the scope of the plot and iden-

tify the conspirators.[11] That chronology undermines any claim that the examinations were part of a calm, collected exercise to build a record for Raleigh's trial. Rather, the Crown was arresting and examining everyone it could get its hands on in an effort to uncover the plot and apprehend all those responsible.

Fenwick's Case also refutes the State's theory. That case involved a plot to assassinate the King and facilitate a French invasion. See 13 How. St. Tr. 537, 547-48 (H.C. 1696); 4 Thomas B. Macaulay, *The History of England* 568-70 (London 1855). Although a variety of *ex parte* testimony was introduced, the most contested was an information a co-conspirator, Goodman, had sworn out implicating Fenwick and other conspirators. See 13 How. St. Tr. at 591-610. When Goodman gave that testimony, Fenwick had not yet been arrested; he was still on the run a month later, after he was indicted. See 13 How. St. Tr. at 547, 607 (dates); Macaulay, *supra*, at 714-15; *Carmell* v. *Texas*, 529 U.S. 513, 526-27 (2000).

Raleigh's and Fenwick's trials were two of the most salient confrontation abuses in English history. See

---

[11] One Anthony Copley was arrested and examined on July 12, 1603. See William Stebbing, *Sir Walter Ralegh: A Biography* 188 (1899); 1 Edward Edwards, *The Life of Sir Walter Ralegh* 365 (1868). Other arrests and examinations followed—Brooke, Watson, Grey, Markham. Stebbing, *supra*, at 188; 1 Edwards, *supra*, at 365, 369-71. Raleigh himself was examined while visiting Windsor between July 12 and 16. Stebbing, *supra*, at 188-90; 1 Edwards, *supra*, at 365-68. He then returned home (although by one account was put on house arrest). Stebbing, *supra*, at 190; 1 Edwards, *supra*, at 368. Information from Raleigh cast suspicion on Cobham, who was examined multiple times, culminating in a July 20 confession accusing Raleigh. Stebbing, *supra*, at 191-92; 1 Edwards, *supra*, at 371-72. Raleigh was then promptly imprisoned in the Tower. 1 Edwards, *supra*, at 373. Although Cobham's is the best known, many of those examinations were introduced at Raleigh's trial. See 2 How. St. Tr. at 10-24; 1 Jardine, *supra*, at 410-33.

Crawford, 541 U.S. at 44-46; *e.g.*, 2 Hawkins (1721), *supra*, at 428 & n.a, 430 & n.c. If the mere need to apprehend dangerous offenders made confrontation principles inapplicable, the cases would have been unobjectionable.

B. Covington's Need for Medical Care Did Not Render His Accusations Non-Testimonial

The State also urges that Covington's accusations were admissible because his injuries posed an ongoing medical emergency. This Court has indeed suggested that statements "for [medical] treatment purposes" are non-testimonial. *Melendez-Diaz*, 129 S. Ct. at 2533 n.2. But the court below properly rejected the argument on these facts.

Not only were Covington's statements made to investigating police officers rather than medical personnel. Pet. App. 9A. They also went well beyond medically relevant facts (that Covington had been shot and needed medical care) to matters of negligible diagnostic relevance but considerable investigatory significance (the shooter's identity and the events leading up to the shooting). *Ibid.* Any reasonable person in Covington's position would have understood he was providing information for a police investigation, not to obtain medical care.

The federal hearsay exception for statements seeking medical aid excludes statements concerning an injury's cause unless "reasonably pertinent to diagnosis or treatment." Fed. R. Evid. 803(4). And courts have held that accusations identifying one's assailant "'seldom, if ever,'" qualify. *E.g.*, *United States* v. *Gabe*, 237 F.3d 954, 958 (8th Cir. 2001). While the scope of Rule 803(4) obviously cannot determine the scope of the Confrontation Clause, the common-sense notion that there is little medical relevance to statements accusing someone of a crime and describing the preceding events is apt in either context.

III. Covington's Accusations Are Not Exempt As Excited Utterances or *Res Gestae*

The State's *amici* invoke the "excited utterance" exception to the hearsay rule and its precursor, the "*res gestae*" exception, urging the Court either to rely on them in defining the scope of testimonial statements or to treat them, like dying declarations, as categorical exclusions. Those arguments lack merit.

A. There Was No *Res Gestae* or Excited Utterance Exception at Framing-Era Common Law

Eighteenth-century evidence and criminal procedure treatises contain thorough discussions of the rule against hearsay. They uniformly fail to mention any exception for excited utterances or *res gestae*.

Gilbert's original edition, for example, mentioned only one exception for unsworn hearsay: "Corroboration of a Witness['s] Testimony to shew that he affirmed the same thing before on other Occasions." Gilbert (1754), *supra*, at 108. Lofft's expanded 1791 edition added dying declarations, the defendant's own admissions, and a now-obscure "inducement" exception applicable to certain background information that did not implicate the defendant personally. 1 Geoffrey Gilbert, *The Law of Evidence* 280 (Lofft ed., 1791); 2 *id.* at 891. It also mentioned exceptions pertinent to civil cases—prescription, title, ancestry, legitimacy, 1 *id.* at 279—but cautioned that they "have their place in civil, [and] do not apply to criminal Cases," 2 *id.* at 889. Neither edition mentions excited utterances or *res gestae*.

Hawkins's original edition noted only three exceptions: the defendant's own admissions, a testifying witness's prior consistent or inconsistent statements, and the "inducement or illustration" exception mentioned above. 2 Hawkins (1721), *supra*, at 431. Leach's expanded 1787 edition added dying declarations. 2 William

Hawkins, *A Treatise of the Pleas of the Crown* 619 & n.10 (Leach 6th ed. 1787). Because Hawkins's treatise concerned criminal procedure, it did not mention any civil exceptions. And there is no mention of excited utterances or *res gestae*.

Other treatises contained similar lists. See William Nelson, *The Law of Evidence* 232 (1717) (corroboration, inducement); Bathurst (1761), *supra*, at 111-13 (corroboration, legitimacy, ancestry, prescription, title); 1 Richard Burn, *The Justice of the Peace and Parish Officer* 345 (8th ed. 1764) (dying declarations, corroboration, legitimacy, ancestry, prescription); Buller (1772), *supra*, at 290-91 (same as Bathurst); Peake (1801), *supra*, at 7-13 (pedigree, prescription, custom, business records, admissions). "*[N]one* of the preframing sources mentioned the modern 'res gestae' [or] 'spontaneous declaration' [exceptions]." Davies, *supra*, at 418 (emphasis added). Aside from dying declarations, moreover, the exceptions that *were* mentioned generally covered either statements not implicating the confrontation right (admissions, corroboration, etc.) or matters that by nature pertained only to civil cases (ancestry, prescription, etc.). Thus, not only was there no *res gestae* or "excited utterance" exception, there was no reason to anticipate the emergence of such an exception.

The only pre-framing authority the State's *amici* cite is *Thompson* v. *Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1693) (also reported at Holt 286, 90 Eng. Rep. 1057). *Thompson* was a *civil* suit for personal injuries in which the court admitted statements made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Id.* at 402, 90 Eng. Rep. at 179. That single case, however, was too obscure to have informed contemporary understanding of the Confrontation Clause.

As already explained, none of the eighteenth-century treatises mentioned a *res gestae* or excited utterance exception, much less cited *Thompson* for that exception. See pp. 24-25, *supra*. And the treatises that did cite *Thompson* did so for a variety of propositions. Gilbert cited it for the point that prior consistent statements were admissible—evidently assuming that the declarant had testified at trial and that the prior statement was admitted only to corroborate her testimony. See Gilbert (1754), *supra*, at 108 & n. Bacon cited it (somewhat cryptically) for the inducement exception, which did not extend to evidence implicating the defendant personally. See 2 Bacon, *supra*, at 313 & n. Starkie later cited it for the point that "the *fact* of making the complaint immediately * * * is admissible in evidence"—as if the fact of the report, but not its contents, had been admitted. 1 Starkie, *supra*, at 149 & n.(p) (emphasis added); cf. *Rex* v. *Clarke*, 2 Stark. 241, 242-43, 171 Eng. Rep. 633, 634 (1817). That treatise-writers could not even agree what point *Thompson* stood for strongly suggests it was a historical oddity. Surely if the legal community understood the case to stand for the doctrine now ascribed to it, some treatise, somewhere, would have said so in the hundred years between its decision and the framing.

The suggestion that this lone case renders *res gestae* or excited utterances comparable to dying declarations is absurd. The dying declaration exception was recognized in at least nine eighteenth-century English cases,[12] was

---

[12] *King* v. *Ely* (1720), in 12 Charles Viner, *A General Abridgment of Law and Equity* 118 (c. 1757); *Rex* v. *Reason & Tranter*, 1 Strange 499, 499-500, 93 Eng. Rep. 659, 659-60 (K.B. 1722); *Bambridge's Case*, 17 How. St. Tr. 397, 417 (1730); *Tinckler's Case* (1781), in 1 Edward Hyde East, *A Treatise of the Pleas of the Crown* 354 (1803); *King* v. *Drummond*, 1 Leach 337, 337-38, 168 Eng. Rep. 271, 272 (1784) (reported 1789); *King* v. *Radbourne*, 1 Leach 457, 460-62, 168 Eng. Rep. 330, 332-33 (1787) (reported 1789/1800); *King* v. *Wood-*

noted in multiple framing-era treatises, see pp. 24-25, *supra*, was endorsed by state and federal courts immediately after the framing,[13] and had conceptual roots dating back to *Raleigh's Case*.[14] That impressive pedigree illustrates the sort of support this Court should insist on before invoking a historical hearsay exception to narrow the Sixth Amendment's scope. One solitary decision in an enigmatic and inconsistently described *civil* case does not remotely meet that standard.

B. The Nineteenth-Century *Res Gestae* Exception Does Not Support the State's Position

A *res gestae* exception did emerge during the *nineteenth* century, but it does not help the State. "*Res gestae*" is, literally, "things done." *Black's Law Dictionary* 1423 (9th ed. 2009). The theory behind the exception was that a statement could be admitted if it had independent significance as a "circumstance which is part of the transaction itself." 1 Starkie, *supra*, at 47-48; see also S.M. Phillipps, *A Treatise on the Law of Evidence* 102 (1814); William D. Evans, *On the Law of Evidence*, in 2 Robert J. Pothier, *A Treatise on the Law of Obligations or Contracts* app. 16, at 141, 284 (1806). Thus, a crime victim's exclamation during the attack—such as "Don't, Harry!"—would be *res gestae*, while an account after the attack would not. *Regina* v. *Bedingfield*, 14 Cox Crim. Cas. 341, 342-43 (1879). The exception did not extend to

---

cock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789) (reported 1789); *John's Case* (1790), in 1 East, *supra*, at 357; *Welbourn's Case* (1792), in 1 East, *supra*, at 358.

[13] *Respublica* v. *Langcake*, 1 Yeates 415, 416-17 (Pa. 1795); *State* v. *Moody*, 3 N.C. (2 Hayw.) 31, 31 (Super. L. & Eq. 1798); *United States* v. *McGurk*, 26 F. Cas. 1097, 1097 (C.C.D.C. 1802) (No. 15,680); *United States* v. *Veitch*, 28 F. Cas. 367, 367-68 (C.C.D.C. 1803) (No. 16,614).

[14] See 2 How. St. Tr. at 18 ("*Nem moriturus praesumitur mentiri*"—a dying man never lies); 1 Jardine, *supra*, at 435.

"narrative[s] of past events, made after the events are closed." Francis Wharton, *A Treatise on the Law of Evidence in Criminal Issues* § 264, at 198 (9th ed. 1884); see also *Enos* v. *Tuttle*, 3 Conn. 247, 250 (1820); Friedman & McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171, 1209-24 (2002).

Prosecutors often tried to invoke the *res gestae* exception to admit out-of-court accusations made shortly after a crime, on the theory that they were sufficiently contemporaneous to be part of the *res gestae*. Courts routinely rejected such attempts. In *Mayes* v. *State*, 1 So. 733 (Miss. 1887), for example, the court rejected a stabbing victim's identification of his assailant five minutes after the crime. *Id.* at 733-34. It explained: "The true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, or is merely a history, or a part of a history, of a completed past affair. In the one case it is competent; in the other, it is not." *Id.* at 735. Other cases were similar. See, *e.g.*, *Bedingfield*, 14 Cox Crim. Cas. at 342-43 (excluding statement made by decedent upon emerging from house immediately after having throat cut); *State* v. *Davidson*, 30 Vt. 377, 383-84 (1858); *State* v. *Carlton*, 48 Vt. 636, 642-44 (1876); *Binns* v. *State*, 57 Ind. 46, 48-51 (1877); *Jones* v. *State*, 71 Ind. 66, 81-83 (1880); *State* v. *Pomeroy*, 25 Kan. 349, 350-51 (1881); *State* v. *Estoup*, 1 So. 448, 448-50 (La. 1887); *People* v. *Ah Lee*, 60 Cal. 85, 88-92 (1882) (plurality), and *People* v. *Wong Ark*, 30 P. 1115, 1115-16 (Cal. 1892), both overruled by *Showalter* v. *W. Pac. R. Co.*, 106 P.2d 895, 898-99 (Cal. 1940); Fisher, *What Happened—and What Is Happening—to the Confrontation Clause*, 15 J.L. & Pol'y 587, 591-608 (2007).

Admittedly, some courts took a broader view. In 1805, an English judge mentioned *Thompson* during a colloquy in an insurance lawsuit and characterized it as having ad-

mitted statements "as part of the res gestae." *Aveson* v. *Kinnaird*, 6 East 188, 193-94, 102 Eng. Rep. 1258, 1261 (K.B. 1805) (Ellenborough, C.J.). *Aveson* thus laid the groundwork for the conceptually dubious idea that the *res gestae* could include accusations of a crime if made sufficiently soon after. In *Rex* v. *Foster*, 6 Car. & P. 325, 325, 172 Eng. Rep. 1261, 1261 (1834), a court invoked *Aveson* to admit a victim's accusation made immediately after a carriage accident, and in *Commonwealth* v. *McPike*, 57 Mass. (3 Cush.) 181, 184 (1849), a court admitted accusations made shortly after a stabbing. In *Insurance Co.* v. *Mosley*, 75 U.S. 397, 405-09 (1869), this Court—in a divided decision—followed those cases in another civil insurance lawsuit.

All those cases, however, were controversial. An English treatise described *Foster* as "difficult to reconcile with established principles." David Power, *Roscoe's Digest of the Law of Evidence in Criminal Cases* 26 (5th ed. 1861). At least three state supreme courts expressly rejected *McPike*. See *Binns*, 57 Ind. at 51 ("against the weight of authority"); *Mayes*, 1 So. at 734-35 ("practically overruled"); *Ah Lee*, 60 Cal. at 88-92 (plurality) ("'very questionable'"). And a leading American authority wrote that *McPike* "cannot be sustained," *Mosley* "may be gravely questioned," and "[t]he better rule is that when the transaction is over, no matter how short may have been the interval, * * * declarations by the assailed * * * are not part of the *res gestae*." Wharton, *supra*, § 262, at 194-95 & n.2.

In any event, even those more liberal cases cannot help the State. *Foster* involved statements made "immediately after" the accident to another driver who had seen the carriage pass by; surely no more than a minute or two could have elapsed. 6 Car. & P. at 325, 172 Eng. Rep. at 1261. *Thompson* and *Mosley* appear similar. See Skin. at 402, 90 Eng. Rep. at 179 ("immediat[ely] upon

the hurt received"); 75 U.S. at 404 (declarations "made immediately, or very soon after the fall; the declarations to his son, before he returned to his bed-room; those to his wife, upon his reaching there"). And while the delay in *McPike* may have been longer, see 57 Mass. at 182, there is no indication it was anywhere close to the half-hour lapse here, Pet. App. 15A-16A.

The United States cites those cases for the point that "[t]he Framers would not have understood the law categorically to forbid" statements of the sort at issue. U.S. Br. 18-19. To reverse the judgment on that basis, however, one would have to assume (1) that the Framers would have anticipated a *res gestae* doctrine wholly unknown at the time; (2) that they would have adopted the most expansive variation of that doctrine rather than the narrower and conceptually sounder one; and (3) that they would have extended those cases far beyond their facts. That is three inferential leaps too many.

To the extent *res gestae* concepts matter, they hurt rather than help the State. This Court made clear in *Davis* that there is a critical constitutional distinction between statements describing current conditions and those narrating past events. McCottry's 911 call was non-testimonial because she was "speaking about events *as they were actually happening*, rather than 'describ-[ing] past events,'" 547 U.S. at 827, while Hammon's statements were testimonial because they concerned not "'what is happening,' but rather 'what happened,'" *id.* at 830; see also *id.* at 828 ("an account of past events"); *id.* at 830 ("deliberately recounted * * * past events"). That distinction maps directly onto the *narrower* formulation of the *res gestae* rule, which covered statements contemporaneous with the transaction but not after-the-fact reports. That is no coincidence, as both tests ultimately seek to distinguish statements with independent significance from those that are merely a weaker substitute for

trial testimony. Had the Framers considered the *res gestae* principle in adopting the Sixth Amendment, therefore, they surely would have incorporated the narrower version, which would clearly exclude the statements here.

CONCLUSION

The decision of the Michigan Supreme Court should be affirmed.

Respectfully submitted.

BARBARA E. BERGMAN
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
CO-CHAIR, NACDL AMICUS COMMITTEE
UNM School of Law
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-3304

ROBERT K. KRY
Counsel of Record
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2011

Counsel for Amicus Curiae

June 2010